89-282

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COMBINED INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

THOMAS AINSWORTH,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

Of Counsel:

CHARLES ALAN WRIGHT
727 East 26th Street
Austin, Texas 78705
(512) 471-5151

*STEPHEN L. MORRIS
M. KRISTINA PICKERING
LIONEL SAWYER & COLLINS
1700 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
(702) 383-8888

GEOFFREY C. HAZARD, JR.
127 Wall Street
New Haven, Connecticut 06520
(203) 432-4971

Attorneys for Petitioner

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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APPENDIX A—PART 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 17625

THOMAS AINSWORTH,

Appellant,

vs.

COMBINED INSURANCE COMPANY OF AMERICA,

Respondent.

FILED

May 19, 1989

CLERK OF SUPREME COURT
By /s/ Jeanne C. Richards
CLERK

Appeal from a judgment notwithstanding the verdict. Second Judicial District Court, Washoe County; Deborah A. Agosti, Judge. Petitions for rehearing and motions relating to participation of Supreme Court justice in the above-entitled matter.

Petitions for rehearing denied; motions denied.

Peter Chase Neumann, Reno; Bradley & Drendel, Reno, for Appellant.

Mortimer, Sourwine, Mousel, Sloane & Knobel, Reno; Lionel Sawyer & Collins, and M. Kristina Pickering and Steve Morris, Las

Vegas, Geoffrey C. Hazard, Jr.,
New Haven, Connecticut,
for Respondent.

Laura FitzSimmons, Carson City,
for Amicus Curiae.

OPINION

PER CURIAM:

On October 26, 1988, in an opinion authored by former Chief Justice E.M. Gunderson,[1] this court unanimously concluded that substantial evidence supported the jury's assessment of $5,939,500 in punitive damages against respondent Combined Insurance Company of America (Combined). Accordingly, we reversed the district court's judgment notwithstanding the jury's verdict, reinstated the jury's assessment of punitive damages against Combined, and affirmed the district court's denial of Combined's motion for a new trial. *See* Ainsworth v. Combined Ins. Co., 104 Nev. ___, 763 P.2d 673 (1988).

Pursuant to NRAP 40, both parties to this appeal subsequently filed timely petitions for rehearing challenging different facets of this court's decision. Thereafter, on December 30, 1988, forty-six days after the time to file a petition for rehearing had expired under NRAP 40(a), and on the last judicial day preceding Chief Justice Gunderson's official retirement as an elected justice of this court, Combined filed a motion alleging that then Chief Justice Gunderson was disqualified from any participation in this appeal. Combined's motion, therefore, requests this court

[1] After serving on this court for eighteen years, Chief Justice Gunderson did not seek re-election to a fourth term of office. His elected term formally expired on January 2, 1989, when then Justice-elect Rose succeeded to that office. *See* Nev. Const. art. 6, § 3. Thus, neither Justice Rose nor former Chief Justice Gunderson participated in the court's deliberations on the petitions for rehearing and the motions resolved in this opinion.

to issue an order (1) disqualifying former Chief Justice Gunderson from any future participation in this matter, (2) vacating the opinion, and (3) scheduling reargument on the merits of the appeal. On February 7, 1989, Combined also filed a "supplemental motion" seeking an evidentiary hearing and discovery on certain factual allegations relating to the issue of disqualification. Combined further supplemented its motions with papers asserting previously unraised allegations of improperiety on February 16, 1989. Appellant Ainsworth opposes both Combined's petition for rehearing and its motions respecting former Chief Justice Gunderson's participation in this appeal. In addition, Ainsworth has requested this court to impose sanctions upon Combined and its counsel pursuant to NRCP 11 and NRAP 38 for abusing the appellate processes of this court.

On February 24, 1989, former Chief Justice Gunderson filed a personal response to Combined's allegations challenging his prior participation in this appeal. Among other things, his response expresses the view that Combined's allegations of ethical impropriety constitute procedurally improper, belated attempts to obfuscate the issues, delay the final resolution of this matter, and abuse the appellate processes of this court.[2] Accordingly, former Chief Justice

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[2] In an effort to impose a degree of judicial decorum in these proceedings, and pending our consideration of the timeliness and procedural propriety of the various documents before us, Chief Justice Young entered orders on February 24, 1989, and March 10, 1989, directing "the clerk of this court to neither receive, nor file, any further papers in this matter unless the Chief Justice or Acting Chief Justice first has expressly granted a party leave to file such papers." Pursuant to those directives, Combined has requested leave of Chief Justice Young to file a reply primarily addressing former Chief Justice Gunderson's personal response of February 24, 1989. We have carefully considered the matters set forth in Combined's latest proposed reply, and we conclude that, under the circumstances present here, Combined's reply may be made a part of the official record of this proceeding. *See* Component Systems v. District Court, 101 Nev. 76, 79 n.2, 692 P.2d 1296, 1299 (1985). Accordingly, we hereby direct the clerk of this court to file that

Gunderson's response suggests that Combined's allegations respecting his prior participation in this appeal warrant summary rejection.

Having carefully considered all the papers and documents tendered in this matter, and for the reasons set forth below, we deny all the petitions and motions presently pending in this docket, with the above-noted exception of Combined's request for leave to file its latest proposed reply.

I. AINSWORTH'S PETITION FOR REHEARING

In his petition for rehearing, Ainsworth requests reconsideration and clarification of footnote 2 of the opinion so as to permit him to collect post-judgment interest on the jury's award for punitive damages.[3] *See* Ainsworth v. Com-

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document.

We observe, however, that sound judicial policy underlies the absence of any provisions in our rules permitting the filing of replies to oppositions to motions and petitions without the express leave of this court. *See* NRAP 27; NRAP 40. No litigant has an unqualified right to inundate a court with motions, supplements, errata, responses, exhibits and replies belatedly asserting arguments that it previously failed to raise. Nor do litigants have unfettered license to utilize such methods to manipulate judicial proceedings and unreasonably delay a final resolution of litigation. Moreover, although we have concluded that Combined's additional papers do not necessarily prejudice the opposing party or further burden this court with additional improper argument, we specifically reject Combined's contention that it has a due process right to reply to what it characterizes as former Chief Justice Gunderson's "governmental attack." *Cf.* Gardiner v. A.H. Robins Co., Inc., 747 F.2d 1180 (8th Cir. 1984). At the time his response was filed in this court, former Chief Justice Gunderson had retired from his elected position on this court, and he was performing no judicial functions related to this appeal. Therefore, his response is not a judicial or governmental declaration; it is simply his personal response to publicly disclosed accusations tendered against him by Combined and its counsel.

[3] Ainsworth initially asserted these same arguments in a motion to amend the opinion. Combined contends that the motion is procedurally improper. Any perceived procedural errors arising out of the fact that

bined Ins. Co., 104 Nev. ___, ___, n.2, 763 P.2d 673, 677 (1988). The challenged footnote concluded that appellant was "not entitled to interest on the punitive damages award." *See* Ramada Inns v. Sharp, 101 Nev. 824, 711 P.2d 1 (1985). Further, it observed that Combined had previously tendered full payment of that portion of the judgment below awarding Ainsworth approximately $210,000 in policy benefits and compensatory damages. Thus, we held that Ainsworth was not entitled to the payment of any interest whatsoever on the judgment. The footnote clearly illustrates that we previously considered and rejected Ainsworth's contentions on appeal respecting his entitlement to interest. His similar contentions on rehearing, therefore, constitute improper reargument under NRAP 40(c)(1).[4]

Ainsworth contends, however, that this court may have overlooked or misapprehended case law which is arguably favorable to his position. *See* Buck v. Burton, 768 F.2d 285 (8th Cir. 1985), *citing* Turner v. Japan Lines, Ltd., 702 F.2d 752 (9th Cir. 1983) (purpose of awarding interest

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Ainsworth initially raised these contentions by motion, were remedied and rendered moot when Ainsworth subsequently filed his timely petition for rehearing seeking the same relief. Accordingly, and in light of our decision denying Ainsworth's petition for rehearing, we also deny as moot Ainsworth's initial motion to amend.

[4] NRAP 40(c) provides:

> (1) Matters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing.
>
> (2) The court may consider rehearings in the following circumstances:
>
> (i) When it appears that the court has overlooked or misapprehended a material matter in the record or otherwise, or
>
> (ii) In such other circumstances as will promote substantial justice.

to a party recovering money judgment is to compensate the wronged person for being deprived of the monetary value of the loss from the time of the loss to the payment of the money judgment). Additionally, Ainsworth now proposes that awards of post-judgment interest on judgments assessing punitive damages would promote substantial justice and deter frivolous appeals and other dilatory tactics by defendants who can afford to litigate such judgments endlessly. We disagree.

First, Ainsworth has raised these particular legal arguments for the first time on rehearing. Consequently, they constitute improper argument under NRAP 40(c)(1). Second, in Ramada Inns v. Sharp, 101 Nev. 824, 711 P.2d 1 (1985), we observed that the purposes underlying compensatory and punitive damages distinguish a plaintiff's entitlement to *prejudgment* interest on such awards. While compensatory damages are intended to *compensate* a wronged party, punitive damages are solely designed to punish and deter fraudulent, malicious or oppressive conduct. *See also* NRS 42.010. A plaintiff is therefore never entitled to punitive damages as a matter of right. Thus, in rejecting Ainsworth's arguments on appeal respecting his entitlement to interest, we applied our prior reasoning and holding in *Ramada Inns* to the question of *post-judgment* interest, and concluded that the purposes and policies underlying awards of punitive damages would not be furthered by an award of *any* interest in this case. The authorities Ainsworth has cited for the first time on rehearing do not alter our conclusion in this regard. Third, we have concluded that other more appropriate means are available to deter frivolous litigation and dilatory tactics. *See* NRCP 11; NRAP 38. In sum, this court did not misapprehend or overlook any material matters in this regard. Nor has Ainsworth presented any persuasive reasons demonstrating that a departure from our prior holding would "promote substantial justice." Accordingly, we deny Ainsworth's petition for rehearing. *See* NRAP 40(c).

II. COMBINED'S PETITION FOR REHEARING

First, Combined contends that this court's opinion assumes material facts not found in the record and misstates others that are. Specifically, Combined complains that the opinion unfairly and inaccurately represents that, at the time Combined denied Ainsworth's first claim for benefits, it had reason to know from its review of the initial claims form that a doctor's statement respecting the cause of Ainsworth's stroke was nothing more than an "hypothesis." *See Ainsworth*, 104 Nev. at ___, 763 P.2d at 674. Combined correctly notes that the initial doctor's report contained in the first claims form submitted by Mrs. Ainsworth simply stated that a disease of the arteries was the cause of Ainsworth's stroke.[5] The claims form contained nothing to indicate that the doctor's initial report was merely an hypothesis. Nonetheless, it is undisputed that evidence was presented to Combined, after it had denied the first claim, indicating that the doctor had since concluded the stroke was the result of an accident, not a disease. Further, as Combined observed in its brief on appeal, the doctor himself later testified at trial that his initial report was pure speculation and an hypothesis. Our reference to the initial doctor's report as an "hypothesis," therefore, was ultimately factually accurate.[6] Thus, this court was adequately and accurately informed, and no material matter was misapprehended or overlooked in this

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[5] Specifically, the doctor's report stated, "Stroke occurred from disruption of atheromatous plaque during angiogram."

[6] During the oral argument of this appeal, Justice Steffen specifically focused on this issue and questioned appellant's counsel in detail as to whether Combined's initial denial of the claim was in fact reasonably based on the doctor's first report. As that colloquy clearly reveals, and as our opinion reflects, Combined's subsequent failure to investigate and evaluate the claim fairly and its subsequent denials of the Ainsworths' repeated requests for reconsideration, after it had reason to know of Ainsworth's dire need for benefits, constitute the conduct that supports the jury's punitive damage award.

regard. *See* NRAP 40(c). Consequently, we conclude that this contention does not form a proper basis for rehearing.

Combined further contends, however, that the opinion inaccurately states that "Combined sent [Mrs. Ainsworth] a third denial letter" prior to receiving the results of its medical consultant's second evaluation of the claim. *See Ainsworth*, 104 Nev. at ___, 763 P.2d at 674. We concede the opinion misstates this fact, and we hasten to correct our inaccurate summary of that sequence of events. As Combined observes, the undisputed testimony on this subject at trial indicates that, although Combined's adjuster prepared and dated the third denial letter prior to Combined's receipt of its medical consultant's second evaluation, the letter was apparently not mailed to Ainsworth until *after* Combined's medical consultant completed his second evaluation.

Although the opinion does misstate this sequence of events, we are not persuaded that this court thereby overlooked a material matter, or labored under a material misapprehension. *See* NRAP 40(c). The opinion otherwise accurately sets forth substantial evidence supporting the jury's verdict. Accordingly, this matter does not alter our consensus that the record as a whole provides substantial support for the jury's verdict, and we therefore conclude that rehearing is not warranted on this basis.

Second, Combined argues that, in the opinion, this court overlooked and omitted facts favoring Combined's position that it did not act in a manner deserving of punitive damages. In its latest reply, Combined further complains that this court did not give appropriate deference to the district court's view of the evidence. Specifically, Combined argues that this court:

> could only read about what the trial judge experienced in person, yet the Court concluded she was wrong in her view of the facts and law. on punitive damages. *But see* Jeffers v. Bob Kauf-

> man Machinery, 101 Nev. 684, 686-87, 707 P.2d 1153, 1154 (1985) (in considering a district court's decision to withdraw the issue of punitive damages from the jury, "we give deference to the district court's weighing of the evidence").

Combined's contentions, however, fail to recognize that, under the well-established standard of review governing appeals from judgments notwithstanding a jury's verdict, our primary focus was not with each and every fact before the jury favoring Combined's position, nor was our primary focus with the district judge's view of the facts. Rather, our main concern was with whether the jury's view of the facts was supported by *any substantial evidence in the record*. *See* Jacobson v. Manfredi, 100 Nev. 226, 679 P.2d 251 (1984). Although in *Jeffers* we gave deference to the district court's weighing of the evidence, where the district court had withdrawn the issue of punitive damages from the jury *during the trial*, we also reversed the district court's separate *post-trial* grant of a judgment notwithstanding the jury's verdict on the underlying cause of action. In so doing, we explained that the standard governing our review of an order granting a motion for judgment n.o.v. compels us to view the evidence that was before the jury "in a light most favorable to the nonmovant." We further observed that, in reviewing a grant of a judgment n.o.v., the nonmovant must be given " 'the benefit of every reasonable inference' from any substantial evidence supporting the verdict." *Jeffers*, 101 Nev. at 685, 707 P.2d at 1154. Additionally, we have previously held that, in passing upon a motion for judgment n.o.v., "neither the credibility of the witnesses nor the weight of the evidence may be considered," and the district court "may only grant the motion if the evidence was such that 'reasonable men would have necessarily reached a different conclusion.' " *See* Wilkes v. Anderson, 100 Nev. 433, 434 683 P.2d 35 (1984).

Similarly, as our opinion in *Ainsworth* clearly states, our review of the evidence in this record was guided by this standard of review. *See Ainsworth*, 104 Nev. at ___, 763 P.2d at 675. Former Chief Justice Gunderson, therefore, quite properly confined our opinion's recital of the facts to the substantial evidence in the record supporting the jury's verdict. Contrary to Combined's contention, we did not thereby unfairly resolve the evidence against Combined. We simply reviewed *all the evidence* in the light most favorable to Ainsworth, as we are required to do under the pertinent standard of review. We further considered all the pertinent facts and contentions raised by the parties before issuing our opinion reversing the district court's order. Therefore, we conclude rehearing is unwarranted on this basis as well.

Third, Combined alleges that the opinion "finds Combined guilty of oppression for having written and interpreted the policy as it did." Combined further asserts that the case we cited for this alleged "finding" did not involve punitive damages and allegedly supports Combined's position. *See Ainsworth*, 104 Nev. at ___, 763 P.2d at 676, *citing* Catania v. State Farm Life Ins. Co., 95 Nev. 532, 598 P.2d 631 (1979). As Ainsworth responds, however, this court did not "find" Combined guilty of oppression, *the jury did*. We merely held that substantial evidence supported the jury's verdict. The opinion simply does not hold that the policy language itself was evidence of oppression. Rather, it observes that the Ainsworths were entitled to have the policy language applied as the average man would understand it. The *Catania* case is appropriate support for that proposition. Consequently, not only do Combined's contentions in this regard misstate our primary holding and analysis, they completely fail to demonstrate competent grounds for rehearing.

Fourth, Combined alleges that this court announced a "new standard" for punitive damages and that the "new standard" should only be applied prospectively, if at all.

Contrary to Combined's contention, however, we announced no new standards, nor did we hold, as Combined asserts, that proof sufficient to establish bad faith will, without more, also support an award of punitive damages.[7] Rather, in addition to the evidence supporting the jury's finding of bad faith, which Combined did not contest on appeal, we observed that the record also contained substantial evidence that "the Ainsworths were in desperate need of funds, and that Combined had reason to know of their dire circumstances." *Ainsworth*, 104 Nev. at ___, 763 P.2d at 676. For example, the record evidenced that "Combined knew . . . Thomas Ainsworth was a 59-year old male who had suffered a stroke and was comatose for seven days," and that "five times within eighteen months, the insured's wife requested payment, indicating clearly that the policy benefits . . . were urgently needed." *Id.* at ___, 763 P.2d at 675. Moreover, Combined's repeated statements to the Ainsworths that it had given careful consideration to the claim were belied by substantial evidence in the record indicating that, instead, its investigation of the claim was sadly inadequate.

Where, as here, substantial evidence indicates that an insurer knowingly refused payment of a valid claim for

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[7] It could be argued, however, that an insurer's bad faith refusal to honor claims under health, accident and life policies is *per se* tantamount to oppression. People place inordinate reliance on the integrity of insurance companies to provide them the security for which they have bargained and paid. In the instant case, the Ainsworths had faithfully paid their premiums to Combined for thirteen years under the belief that if and when an accident occurred, they would enjoy the financial security they expected their policy to provide them. Instead, Combined made every effort to convince the Ainsworths that they were not entitled to their policy benefits. Perhaps most egregiously, Combined's agents attempted to convince the Ainsworths that Combined had diligently sought to validate and honor their claim, but could not do so because the event upon which the claim was based was not covered by the policy. In many other instances of bad faith denials, disappointed, mistreated insureds are no longer insurable and thus unable to obtain coverage from other, more responsible insurance companies.

urgently needed policy benefits in bad faith, and the insurer not only knew the claimant was in dire need of those benefits, but also had reason to know that it was probable that the claimant would suffer unjust hardship if deprived of those benefits, in our view, a finding of oppression is amply justified.[8] As the opinion points out, our previous decision in Jeep Corporation v. Murray, 101 Nev. 640, 650, 708 P.2d 297, 304 (1985), clearly indicates that "oppression," sufficient to warrant an award of punitive damages under NRS 42.010, "is present where the plaintiff has been subjected to 'cruel and unjust hardship in conscious disregard of his rights.' " *Ainsworth*, 104 Nev. at ___, 763 P.2d at 675. Thus, once again we observe, there was not only substantial evidence supporting the jury's uncontested finding that Combined processed the claim in "bad faith" and in conscious disregard of Ainsworth's clear right to the policy benefits, but there was also substantial evidence supporting a finding that, in so doing, Combined *consciously* and deliberately attempted to pressure the Ainsworths into abandoning their rightful claim, and, thereby, subjected them "to cruel and unjust hardship." Therefore, we applied no "new standard" respecting the sufficiency of the evidence required to support awards of punitive damages. *See also* Roth v. Shell Oil Company, 185

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[8] As our prior opinion in this matter noted, an insurer like Combined has a special relationship with its insureds which is distinguishable from the relationship between parties to ordinary contracts. This special relationship exists in part because, as insurers are well aware, consumers contract for insurance to gain protection, peace of mind and security. *See* Fletcher v. Western National Life Insurance Co., 89 Cal. Rptr. 78, 95 (Cal. Ct. App. 1970); *see also* K Mart Corp. v. Ponsock, 103 Nev. 39, 732 P.2d 1364 (1987). In addition to the jury's uncontested finding that Combined intentionally refused to pay the valid policy claim in bad faith, the record manifestly supports a legitimate inference that Combined had knowledge that its refusal to pay would substantially and adversely affect Ainsworth's comfort, security, peace of mind and well-being. In our view, the finding of bad faith, coupled with Combined's course of conduct and other evidence described in the opinion, supports a finding of oppression.

Cal.App.2d 676, 682 (Cal.App. 1960). Accordingly, we conclude rehearing is unwarranted on this basis.

Fifth, Combined asserts that rehearing is warranted because the amount of punitive damages is excessive. In the papers before us, Combined frequently complains that the punitive damage award is over six times greater than any other such award previously affirmed by this court. Combined further objects to our consideration of the fact that the award constitutes only .4 percent of its 1985 total assets. It argues that the award represents more than 400 percent of the "total revenues Combined derived from its operations in Nevada in 1986," and that assessing punitive damages on the basis of its "policyholder reserves . . . is like assessing punitive damages against a bank based on total deposits, as if the depositors' money were the bank's." Finally, Combined also criticizes the opinion's application of the factors we previously set forth in Ace Truck v. Kahn, 103 Nev. 503, 746 P.2d 132 (1987), as appropriate guidelines upon which to assess the excessiveness of an award of punitive damages. According to Combined, our opinion is "irreconcilably inconsistent" with *Ace Truck* because it allegedly revives the old "financial annihilation" test and the "shock the conscience rule" that *Ace Truck* allegedly rejected. We disagree.

Initially, we acknowledge that the jury's verdict of approximately $6,000,000 is considerable. We note, however, that in spite of the considerable size of the verdict, Combined's counsel did not seriously attempt to present on appeal a factually persuasive or legally comprehensive argument that the verdict was so excessive as to warrant a remand or remittitur. To the contrary, counsel essentially proceeded on an "all or nothing" theory that included no particulars concerning the excessiveness of the punitive award. Such particulars were presented for the first time in Combined's petition for rehearing. In any event, Combined does not now raise any concerns that we

have misapprehended or overlooked, or that we previously failed to consider carefully.[9] NRAP 40(c).

Additionally, the factors we considered in our evaluation of the verdict are far from inconsistent with the guidelines set forth in *Ace Truck*. As we stated in *Ace Truck*, as well as in our previous opinion in this case, the financial position of the defendant remains a relevant circumstance in evaluating excessiveness. Under our holding in *Ace Truck*, we may still appropriately consider "any circumstances which relate to the limits of punishment and deterrence that can be properly imposed in a given case." *Ace Truck*, 103 Nev. at 510, 746 P.2d at 137. Thus, we appropriately considered that the $6,000,000 verdict was only .4 percent of Combined's total 1985 assets in con-

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[9] This court issued its opinion in Ace Truck v. Kahn, 103 Nev. 503, 746 P.2d 132 (1987), on November 30, 1987, six months after the *Ainsworth* appeal was orally argued, but nearly one year before our opinion in *Ainsworth* was issued. We nonetheless considered it appropriate to analyze the size of the verdict in this case under the standards announced in *Ace Truck*. Further, following the issuance of the *Ace Truck* opinion, the parties were permitted to file supplemental briefs on appeal. Nonetheless, Combined still did not address in a meaningful way the specific factors set forth in *Ace Truck*. As noted, we deem it of some significance that Combined did not attempt to present a compelling, factually complete and legally tenable argument on appeal addressing the propriety of a substantial reduction in the award. Although Combined's briefs asserted in a superficial and cursory manner that the verdict "shocked the conscience," that the jury received no proper guidance on the question of damages, and that the jury "only heard counsel's impassioned argument that damages would be assessed as a percentage of the Combined's net worth," the major focus of Combined's argument in its briefs on appeal was that the verdict constituted an excessive fine or a violation of due process under the constitution. Further, Combined's briefs made only passing reference to this court's inherent authority to issue a remittitur of the verdict in requesting such action as an alternative to reversal or remand. At oral argument, Combined's counsel made no reference whatsoever to these issues. This court may have been much more receptive to Combined's contentions, if they had been cogently presented on appeal rather than belatedly asserted in a petition for rehearing.

cluding that the verdict was not excessive. Further, we properly evaluated whether Combined's financial position and whether the nature of its misconduct warranted an award sufficient to cause it real concern if it was to be deterred from similar future misconduct. Similarly, because the "shock the conscience rule" entails an evaluation of the "magnitude of the award as related to the misconduct," such an evaluation is entirely consistent with the views expressed in *Ace Truck*. *Id.* at 507, 746 P.2d at 135. Thus, Combined's allegation that the *Ainsworth* opinion "revives" the "financial annihilation test" and the "shock the conscience rule" that *Ace Truck* "rejected," indicates that Combined has misconstrued the nature of our holdings in both cases.

Moreover, we note that because our opinion in *Ace Truck* was issued after this appeal was briefed and argued, it was entirely proper for this court thoroughly to analyze the verdict in light of the numerous guidelines announced in *Ace Truck*, as well as in accordance with a more traditional analysis. In sum, we were not persuaded under any of those guidelines that the verdict in this case was unwarranted. Combined's belated contentions in rehearing, therefore, relate to matters that we have previously, thoroughly considered—notwithstanding Combined's failure to focus on them—and we have not altered our prior consensus. Accordingly, we conclude that Combined's contentions in this regard state no competent grounds for rehearing.

Finally, Combined alleges for the first time on rehearing that Ainsworth's counsel *may have* improperly orchestrated communications to Combined, prior to the filing of this action, that did nothing to inform Combined that it was mistakenly denying the claims. Specifically, Combined asserts that Ainsworth's counsel *may have* failed to identify himself and "set out his role and knowledge of the facts" in an attempt to "set-up" a claim against Combined for bad faith and punitive damages. Combined further as-

serts that Ainsworth's counsel's conduct should be fully explored in an evidentiary hearing and that, therefore, this court's "opinion should be withdrawn and the matter remanded to the district court for further proceedings pursuant to NRCP 60(b)." We again disagree.

Combined's allegations are entirely speculative. Further, the scant factual assertions submitted in support of these allegations were clearly known to Combined prior to or during the course of the proceedings below. As counsel for Ainsworth observes, Combined had every opportunity to raise these concerns in the district court during or after the trial, but failed to do so. Moreover, it was *Combined's responsibility* to evaluate and pay the claim fairly, in good faith and in a manner free of malice or oppression, not Ainsworth's counsel's responsibility. We conclude, therefore, that Combined's contentions in this regard are not only improperly raised for the first time on rehearing, but are also wholly insufficient to support any reasonable inference of impropriety on the part of Ainsworth's counsel.[10]

In light of the above, we hereby deny Combined's petition for rehearing. NRAP 40(c).

III. COMBINED'S MOTIONS CHALLENGING FORMER CHIEF JUSTICE GUNDERSON'S PARTICIPATION IN THIS APPEAL

On December 30, 1988, the last judicial day of 1988, Combined filed a motion in this court stating in part:

> This motion . . . requests Chief Justice Gunderson to disqualify himself from participating in this appeal from this time forward. In the alternative, in the event Chief Justice Gunderson de-

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[10] Counsel for Ainsworth denies Combined's allegations as "absurd, unfounded and insulting," and has moved to strike this particular portion of Combined's argument. In light of our conclusion that Combined's petition for rehearing is without merit, we deny Ainsworth's motion as moot.

> clines to voluntarily step aside, the motion requests the Court to disqualify him. In either event, the motion also asks the Court to vacate its opinion in this appeal and schedule re-argument on the merits at the earliest time convenient to the Court.

As counsel for Combined were presumably well-aware, however, on January 2, 1989, the very next judicial day, Justice-Elect Rose officially succeeded to former Chief Justice Gunderson's seat on the Nevada Supreme Court. *See* Nev. Const. art. 6, § 3 (justices of supreme court hold office . . . from and including the first Monday of January next succeeding their election). Although upon his retirement Chief Justice Gunderson was duly commissioned a Senior Justice of the Nevada Court System, he may not now lawfully participate in any decision of this court except upon an order of the Chief Justice specifically assigning him to sit temporarily in his capacity as a Senior Justice. *See* Nev. Const. art. 6, § 19(1)(a) and 19(1)(c); SCR 10; *see also* Fox v. Fox, 84 Nev. 368, 441 P.2d 678 (1968) (decree filed by a district judge after the expiration of his term was invalid); Lagrange Constr. v. Del E. Webb Corp., 83 Nev. 524, 435 P.2d 515 (1967) (judge whose term had expired had no power or authority to perform any judicial function). Without a specific order of assignment, Senior Justice Gunderson may perform only "routine ministerial acts." SCR 10(3). No order directing Senior Justice Gunderson to participate in any judicial capacity in this matter has been entered, and Combined has cited no authority in support of its assertion that Senior Justice Gunderson's disqualification is *presently* required or necessary under these circumstances. Accordingly, we conclude that insofar as Combined's motion seeks the voluntary recusal or disqualification of Senior Justice Gunderson from any present participation in this matter, the motion is a nullity. At the very least, that issue does not presently present an "actual controversy," and has been rendered moot by the expi-

ration of his elected term of office. *See generally* Nev. Const. art. 6, § 4; Boulet v. City of Las Vegas, 96 Nev. 611, 614 P.2d 8 (1980).

Combined also argues, however, that former Chief Justice Gunderson's participation in these proceedings was improper and that vacatur and reargument are required because (1) under NRS 1.225, he entertained a disqualifying bias or prejudice for and against the litigants and their counsel; (2) under the Nevada Code of Judicial Conduct, his impartiality was reasonably and sufficiently subject to question so as to create a disqualifying appearance of impropriety; and (3) under the due process clause of the constitution, his alleged partiality denied Combined its right to a fair hearing before an impartial tribunal. Combined asserts that, under these provisions, the former Chief Justice should have disqualified himself from any participation in this matter or disclosed certain facts to Combined's counsel prior to taking part in this appeal. We disagree. For the reasons which follow, we conclude vacatur and reargument are unwarranted as a matter of law because none of the factual allegations Combined has asserted in support of these contentions constitute competent grounds for disqualification under our statutes, our rules of judicial conduct, or the constitution.[11] *See* In re Petition to Recall Dunleavy, 104 Nev. ___, ___ P.2d ___ (Adv. Op. No. 134, December 29, 1988); Goldman v. Bryan, 104 Nev. ___, 764 P.2d 1296 (1988); *see also* Liljeberg v. Health Services Acquisition Corp., ___ U.S. ___, 108 S.Ct. 2194 (1988); Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986).

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[11] The pertinent provisions of NRS 1.225 and the Canons of the Nevada Code of Judicial Conduct are set forth in an appendix to this opinion.

A. Combined's allegations respecting procedural rulings, the oral argument and former Chief Justice Gunderson's response of February 24, 1989.

First, Combined contends that this appeal was handled in a manner that was contrary to this court's "normal procedure." Combined asserts that these "procedural irregularities" evidence former Chief Justice Gunderson's bias or create a disqualifying appearance of impropriety. Specifically, Combined complains that Ainsworth's counsel properly perfected this appeal only after this court issued two *sua sponte* orders in December of 1986, advising counsel that the appeal was jurisdictionally deficient and advising counsel how to correct the deficiency. Next, Combined alleges that, contrary to the court's normal procedure, the former Chief Justice personally "intervened" and entered an order on April 22, 1987, directing the clerk to schedule the appeal on the court's "first available argument calendar." Combined also complains that this court denied its subsequent motion of May 18, 1987, seeking a postponement of the oral argument, with "undue expedition." Combined's motion sought to stay the oral argument in this matter pending the United States Supreme Court's resolution of constitutional questions in an unrelated case that might have had a bearing on the issues presented in this appeal. *See* Bankers Life and Cas. Co. v. Crenshaw, ___ U.S. ___, 108 S.Ct. 1645 (1988).

We observe, however, that the two orders issued by this court in December 1986, were entered prior to the date that Justice Gunderson became Chief Justice, and were not even signed by Justice Gunderson. Although former Chief Justice Gunderson did sign a third order, after he became Chief Justice, allowing this appeal to proceed, such orders advising counsel of jurisdictional defects revealed by our preliminary review of the records on appeal are by no means "contrary to this court's normal procedure." They are issued as a matter of course to insure that this court's jurisdiction to entertain an appeal has been prop-

erly invoked, and to insure that appeals are resolved on the merits whenever possible.[12] Further, former Chief Justice Gunderson's order of April 22, 1987, directing the clerk to schedule oral argument on the next available calendar, was entered *in response to a motion* filed by Ainsworth requesting oral argument of this appeal. This court rarely denies such requests, and in granting them, it is commonplace for the Chief Justice to direct the clerk to schedule oral argument on the next available calendar. Thus, these procedural rulings were not contrary to this court's normal procedure, nor do they demonstrate any prejudice, bias or appearance of impropriety stemming from an extrajudicial source. *See* Shepard v. State, 756 P.2d 597 (Okl. Crim. App. 1988) (judge's honest efforts to expedite trial do not demonstrate bias and are permissible so long as they do not operate to prejudice defendant's rights); *see also* In re Petition to Recall Dunleavy, 104 Nev. ___, ___ P.2d ___ (Adv. Op. No. 134, December 29, 1988) (neither NRS 1.225, nor the code of judicial conduct will permit allegations of bias, partially founded on a justice's performance of his official duties, to disqualify the justice; to do so would nullify the court's authority and permit manipulation of justice, as well as the court); United States v. Board of Sch. Com'rs, Indianapolis, Ind., 503

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[12] For example, a similar order was issued by this court in April of 1988, in an unrelated appeal in which one of Combined's present co-counsel represents the appellants as counsel of record. Like the order signed by former Chief Justice Gunderson is this case, our order in that unrelated case advised counsel that the appeal could proceed because counsel had properly cured a jurisdictional defect pursuant to the directives of an earlier order in which we called that defect to counsel's attention. Further, that order stated that this court had determined that oral argument was warranted and directed the clerk to schedule that appeal for oral argument on the court's "first available calendar." *See* United Fire Ins. Co. v. McClelland, Docket No. 18705 (order filed April 26, 1988). Quite clearly, therefore, counsel for Combined recklessly failed to investigate this court's policies and procedures before tendering the conclusory allegation that the rulings complained of were "contrary to normal procedure."

F.2d 68, 81 (7th Cir. 1974) (rulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification), *cert. denied*, 439 U.S. 824 (1978).

Moreover, this court's order of May 29, 1987, denying Combined's request for a postponement of the oral argument, concluded in part that "the United States Supreme Court may not reach any issue that is directly relevant to this case." As it turns out, that was precisely the result. *See* Bankers Life and Cas. Co. v. Crenshaw, ___ U.S. ___, 108 S.Ct. 1645 (1988) (Supreme Court did not reach insurer's claims that punitive damage award violated due process and other constitutional provisions because such claims were not raised and passed upon in state court). Therefore, Combined has not only failed to allege any legally cognizable grounds establishing bias or an appearance of impropriety, it has also failed to demonstrate that it suffered any prejudice from this court's procedural rulings. Accordingly, we conclude that Combined's contentions in this regard are entirely frivolous and warrant our summary rejection.[13]

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[13] Combined also complains that this court improperly filed former Chief Justice Gunderson's response of February 24, 1989, because that document was not properly served on counsel for Combined pursuant to NRAP 25. In support of this assertion, Combined cites authorities supporting the proposition that a judge is a "party" to a proceeding involving the issue of that judge's disqualification. *See* Harvey v. Lewis, 158 N.W.2d 809 (Mich. Ct. App. 1968). We note, however, that Combined was notified of the filing of the response and no prejudice whatsoever to Combined's position is either alleged or apparent as a result of any failure to serve that document. Moreover, we note that, in spite of Combined's insistence that former Chief Justice Gunderson should be considered a "party" to these proceedings, counsel for Combined never served former Chief Justice Gunderson with *any* of the numerous papers that it has filed with the clerk of this court after his official retirement from his elected office. Any inference that this court has somehow unfairly treated Combined and its counsel is, therefore, wholly

Second, Combined contends that former Chief Justice Gunderson's participation in the oral argument of this appeal evidenced actual bias and prejudice or an appearance of bias and prejudice against Combined and its counsel. In the initial motion and in a statement in support of the motion,[14] counsel for Combined asserted in conclusory terms that, during the oral argument of this matter, the former Chief Justice evidenced "a partisanship inappropriate to the appellate judicial process." Specifically, counsel complains that the former Chief Justice

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unreasonable.

It should also be noted that former Chief Justice Gunderson, who responded to Combined's accusations at the request of this court, was informed by the Clerk of the Court that service of his response was unnecessary because he was not a party, and the Clerk would supply notice of the filing to the parties, which she did. NRAP 25(1)(b) requires service of all papers filed by *parties*. This court has not had the occasion previously to decide whether by reason of a motion to disqualify, the status of a participating justice or judge is transmogrified to that of a party. Although we have substantial doubt that such a change occurs, we decline to decide the issue because Combined has suffered no prejudice whatsoever from the lack of service by or at the behest of former Chief Justice Gunderson.

[14] The factual allegations in Combined's initial motion of December 30, 1988, were supported in part only by the *unsworn* statement of Combined's counsel. Neither NRS 1.225 nor the Nevada Code of Judicial Conduct presently provides that factual allegations in a motion to disqualify a supreme court justice must be made upon affidavit. *Compare* NRS 1.235 (requiring the filing of supporting affidavits in motions seeking disqualification of district judges). We take this opportunity to note, however, that in our future consideration of motions to disqualify a judge or justice, we shall deem it appropriate to substantially discount factual allegations that are not supported by sworn statements and that are not otherwise verifiable from the record before us. Because we have not heretofore addressed this problem in a published decision, and because Combined's factual allegations are otherwise legally insufficient, we do not premise any of our conclusions in this matter on counsel's initial failure to provide his sworn supporting affidavit, nor is it necessary to address the effectiveness of counsel's subsequent affidavit submitted in an attempt to remedy the motion's initial deficiency.

(1) "openly ridiculed" and was uncivil and hostile to Combined and its attorney; (2) "acted not as a member of an appellate court but as an advocate for the appellant"; (3) "expressed the opinion that Combined's very policy was an act of bad faith"; and (4) expressed an "animus" that was not "confined to Combined and its counsel but seemingly reached the insurance industry as a whole." In support of these conclusory accusations, Combined relies upon a copy of the official reporter's audio recording of the oral argument before this court.

We have carefully reviewed the official reporter's master recording of the oral argument, which constitutes the formal record of that hearing, and we conclude that counsel's "statements of mere conclusions" are not only legally insufficient to support Combined's motions, but are also belied by the tone, tenor and substance of former Chief Justice Gunderson's remarks. *See* Litinsky v. Querard, 683 P.2d 816, 818 (Colo. Ct. App. 1984) (to permit "statements of mere conclusions" of the pleader respecting a judge's alleged hostility at trial "to form the basis of a legally sufficient motion to disqualify would be to permit any party dissatisfied with the outcome of a trial to . . . create unwarranted delay and chaos"). In our view, former Chief Justice Gunderson's remarks at oral argument, at the most, displayed his usual, well-known aggressive use of the Socratic method. Contrary to Combined's contentions, his questions directed to Combined's counsel were no more "uncivil or hostile" than those propounded to most first year law students by many of their professors. Further, the former Chief Justice allowed counsel for Combined extra time to complete his arguments and, contrary to normal procedure, again permitted counsel additional time for a second rebuttal at the very end of the argument. A reasonable, objective assessment of the actions and remarks of the former Chief Justice leads to the conclusion that he was merely attempting to insure that the court was adequately apprised of the parties' legal contentions,

and was not acting as an "advocate" for appellant Ainsworth's position. His conduct of the hearing, as well as his questioning of both counsel, were "well within the acceptable boundaries of courtroom exchange." *See* In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1316 (2nd Cir. 1988).

Additionally, former Chief Justice Gunderson's remarks simply reveal judicial familiarity with the factual record that was before this court. Although he may have expressed strong views regarding the jury's uncontested finding of bad faith, and regarding the separate, additional facts in the record evidencing the oppressive nature of Combined's conduct, his expression of those views at the oral argument exhibited no bias stemming from an extrajudicial source. *See* Goldman v. Bryan, 104 Nev. ___, ___, n.6, 764 P.2d 1296, 1301 (1988) (what a judge learns in his official capacity does not establish disqualifying bias under NRS 1.225, or a disqualifying appearance of impropriety under the code of judicial conduct); In re Guardianship of Styer, 536 P.2d 717 (Ariz. Ct. App. 1975) (although a judge may have a strong opinion on merits of a cause or a strong feeling about the type of litigation involved, the expression of such views does not establish disqualifying bias or prejudice). *See also* Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 820-21 (1986) (general claim of hostility on part of state supreme court justice towards insurance companies that were dilatory in paying just claims fell "well below" level of claims constituting sufficient grounds establishing constitutional violation under due process clause); In re International Business Machines Corp. 618 F.2d 923, 931-32 n.11 (2nd Cir. 1980) (where, under federal provision similar to Nevada Code of Judicial Conduct Canon 3, "occasional flareups toward counsel" were held insufficient to establish a judge's personal prejudice against the *litigant* involved, "it would be anomalous to hold" that such a claim could nonetheless satisfy constitutional standard for recusal under the due

process clause). We conclude, therefore, that Combined's contentions respecting former Chief Justice Gunderson's remarks at oral argument are legally insufficient to support the relief requested under either NRS 1.225, the Nevada Code of Judicial Conduct, or the due process clause of the constitution.

Third, in its latest reply, Combined also asserts that former Chief Justice Gunderson's response to Combined's accusations "condemns Combined and its counsel on facts found by the Justice outside the record of this case." Thus, Combined claims that the response "on its face disqualifies Justice Gunderson." We observe, however, that, although former Chief Justice Gunderson's response does indicate that, *after* the opinion in this case issued, his adverse judicial impressions of the respondent insurance company may have been reinforced by extrajudicial, post-opinion reading, his response recites no facts supporting a reasonable inference of preconceived bias against the insurance company stemming from an extrajudicial source *at or prior to the date this case was decided.*

Further, although former Chief Justice Gunderson's response candidly acknowledges that he harbored preconceived, negative impressions respecting the legal abilities of one of Combined's counsel, his response also indicates that those impressions were based upon his perception of counsel's prior "work product and performance in this court." Thus, those perceptions constitute neither an extrajudicial, nor a disqualifying bias. *See generally* Goldman v. Bryan, 104 Nev. ___, 764 P.2d 1296 (1988); *see also* In re Cooper, 821 F.2d 833, 838-42 (1st Cir. 1987) (a judge is not required to "mince words" respecting counsel who appear before him; it is a judge's job to make credibility determinations, and when he does so, he does not thereby become subject, legitimately, to charges of bias). To whatever extent former Chief Justice Gunderson's response may evidence negative, *personal impressions* about Combined's counsel, based upon counsel's prior legal associations, his

performance on the bar examination or his marital situation, those impressions were formed during the course of his judicial and administrative duties as a Justice and Chief Justice on this court.[15] *See* United States v. Conforte, 457 F.Supp. 641, 657 (D. Nev. 1978) (where *origin* of judge's impressions was inextricably bound up with judicial proceedings, judge's alleged bias did not stem from an extrajudicial source), *modified on other grounds*, 624 F.2d 869 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980).

Additionally, those negative impressions extended only to *counsel* for the litigant involved, not to the litigant itself. Generally, an allegation of bias in favor of or against counsel for a litigant states an insufficient ground for disqualification because it is not indicative of extrajudicial bias against the *party*. *See* In re Petition to Recall Dunleavy, 104 Nev. ___, ___ P.2d ___ (Adv. Op. No. 134 at 6), *citing* Gilbert v. City of Little Rock, Ark., 722 F.2d 1390, 1398-99 (8th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984); *see also* Davis v. Board of School Com'rs of Mobile County, 517 F.2d 1044, 1050 (5th Cir. 1975) (if a party could successfully challenge a judge based upon allegations of bias against party's attorney, it "would bid fair to decimate the bench" and lawyers, once in a controversy with a judge, "would have a license under which the judge would serve at their will"), *cert. denied*, 425 U.S. 944 (1976).

Lastly, if we assume that counsel for Combined has seriously tendered his allegations of bias or prejudice aris-

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[15] Although we anticipated and would have much preferred a more restrained response from the former Chief Justice, it is not difficult to understand why the beleaguered jurist may have been goaded to the uttermost limits of his capacity for tolerance. While in the beginnings of recuperation from a major heart attack for which he was hospitalized, Combined filed a supplement to its motion to disqualify the former Chief Justice that irresponsibly accused him of secret business involvements with Ainsworth's counsel through Justice Gunderson's wife. The aforementioned supplement will be dealt with in some detail later in this opinion.

ing out of former Chief Justice Gunderson's alleged hostility at oral argument, then we must also assume that, shortly after the oral argument, counsel was on notice of at least some of the facts asserted in support of these contentions. Counsel, however, electing to gamble on the outcome of our decision, waited over sixteen months until the decision was announced before tendering these contentions to this court. Similarly, counsel was aware of the nature and circumstances surrounding the previously discussed procedural rulings of this court, not only well in advance of the issuance of this court's decision, but also well in advance of the oral argument.

We have previously held that time limitations on a challenge to a district judge's impartiality are not extended for litigants who knew or should have known the necessary facts at an earlier date. *See* Jacobson v. Manfredi, 100 Nev. 226, 679 P.2d 251 (1984). The statutory and code provisions applicable in this case set forth no specific time limits. Well-reasoned authority supports a conclusion, however, that counsel, knowing facts assertively supportive of a motion for reconsideration, recusal or vacatur based upon charges of bias and impropriety, "may not lie in wait" and raise those allegations in a motion "only after learning the court's ruling on the merits." *See* Phillips v. Amoco Oil Co., 799 F.2d 1464, 1472 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987). *See also* Delesdernier v. Porterie, 666 F.2d 116, 121 (5th Cir.) (absence of time requirement in federal disqualification provisions does not "allow counsel to make a game of the federal judiciary's ethical obligations"; judiciary should seek to "preserve the integrity of the [provisions] by discouraging bad faith manipulation of its rules for litigious advantage"), *cert. denied*, 459 U.S. 839 (1982).

We conclude, therefore, that the factual allegations Combined has asserted in these respects are legally insufficient to support the relief requested. Additionally, we conclude that Combined waived its right to raise these

issues at this late date because its counsel, knowing the subsequently asserted factual basis for these allegations, did not promptly tender an objection to this court, but instead remained silent and gambled on the outcome of the appeal.

B. Combined's allegations respecting Ainsworth's counsel's association with former Chief Justice Gunderson's 1982 campaign for judicial office.

Combined disingenuously alleges that former Chief Justice Gunderson should have disqualified himself from any participation in this appeal because he had a close and undisclosed, political relationship with counsel for Ainsworth. Combined observes that both counsel for Ainsworth acted as Washoe County campaign co-chairmen in the former Chief Justice's 1982 campaign for re-election to this court.

In rejecting a similar contention as legally insufficient to support disqualification or vacatur, we recently held:

> [I]ntolerable results would . . . obtain if a litigant could disqualify a member of this court solely because counsel for the litigant's adversary had years before contributed to the justice's campaign. The citizens of this state have voted to retain an elected judiciary and the Nevada Constitution specifically provides that the justices of this court shall be elected. *See* Nev. Const. art. 6, § 3. . . . If the mere fact that an attorney had contributed to a judge's campaign constituted a reasonable ground for the subsequent disqualification of that judge, upon a challenge made after the judge has ruled on the merits of a motion, the conduct of judicial business in the courts of this state would be severely and intolerably obstructed.

See In re Petition to Recall Dunleavy, 104 Nev. ___, ___, ___ P.2d ___, ___ (1988) (Adv. Op. No. 134 at 6). In *Dunleavy*, we further observed:

> In a small state such as Nevada, with a concomitantly limited bar membership, it is inevitable that frequent interactions will occur between the members of the bar and the judiciary. Thus, allegations of bias based upon a judge's associations with counsel for a litigant pose a particularly onerous potential for impeding the dispensation of justice.

Id. at 6-7 *cf.* United States v. Murphy, 768 F.2d 1518, 1537-38 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986). Moreover, as we noted above, an allegation of bias in favor of or against an attorney for a litigant generally states an insufficient ground for disqualification because it is not indicative of extrajudicial bias against a party. *See Dunleavy, supra.*

In the instant case, we similarly conclude that counsel's associations with the campaign in issue, years before this case came before this court, do not presently constitute legally competent grounds for recusal, vacatur or reargument under our statutes or code of judicial conduct. Nor do such associations establish the direct, substantial, pecuniary, and conflicting interests which have been held to warrant recusal and vacatur under the due process clause. *See* Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986). This state's constitution and code of judicial conduct specifically compel and countenance the election of all state judges, and leading members of the state bar play important and active roles in guiding the public's selection of qualified jurists. Under these circumstances, it would be highly anomalous if an attorney's prior participation in a justice's campaign could create a disqualifying interest, an appearance of impropriety or a violation of due process

sufficient to require the justice's recusal from all cases in which that attorney might be involved.

Additionally, we note that Combined has conspicuously refrained from addressing opposing counsel's averments that their association with the campaign was fully disclosed in numerous public, political advertisements and was well-known among members of the state bar long before this appeal was ever perfected. *See* Adair v. Adair, 670 P.2d 1002, 1003 (Okl. Ct. App. 1983) (where counsel failed to refute opposing counsel's averment that he was informed prior to trial of opposing counsel's public support of trial judge's campaign of judicial office, appellate court held that "[f]ailure to timely object waived any disqualification of the judge"). We conclude, therefore, that Combined's counsel had knowledge of the factual basis for this contention well in advance of this appeal, and Combined's failure to tender a prompt objection on this ground precludes it from seeking our present consideration of the question. *See* Jacobson v. Manfredi, 100 Nev. 226, 679 P.2d 251 (1984); Phillips v. Amoco Oil Co., 799 F.2d at 1472; Delesdernier v. Porterie, 666 F.2d at 121.

Finally, in response to Combined's allegations, former Chief Justice Gunderson asserts that an objective assessment of his prior associations with the law firms representing both parties to this appeal reveals no reasonable basis upon which to conclude that he was biased in favor of counsel for Ainsworth. Specifically, former Chief Justice Gunderson avers that the law firm presently representing Combined in this proceeding, Lionel, Sawyer & Collins, was also supportive of his campaign for re-election. Moreover, the response indicates that a senior partner in that firm has not only been a friend, political ally and supporter of the former Chief Justice, but years ago was also the former Chief Justice's law partner. The response also cites numerous published decisions of this court in which the former Chief Justice ruled against the positions espoused by counsel for Ainsworth in matters that had substantial

monetary significance.[16] Under these circumstances, we fully agree with former Chief Justice Gunderson's statement that "[i]t cannot seriously be contended by objective persons that on such a record, an appearance of impropriety now exists."

C. Combined's allegations respecting the Nevada Trial Lawyers Association.

First, Combined contends that former Chief Justice Gunderson improperly participated in this matter because he failed to disclose that the Nevada Trial Lawyer Association (NTLA) "had previously honored [him] for his support of causes they espouse," and that it "did so again shortly before the opinion favoring Ainsworth in this appeal." Combined asserts that, not only are both Ainsworth's counsel active members of the NTLA, but that the NTLA filed a brief in this appeal as amicus curiae in favor of Ainsworth's position. Incredibly, Combined also alleges that, in accepting the above-noted award, the "Chief Justice is reported to have addressed the [NTLA] as a whole and said that the Trial Lawyers were always welcome in the Court because they were always on the right side." Counsel for Combined asserts that he has "interviewed more than one witness on [this] subject," but that "[n]one of these witnesses wishes voluntarily to supply an affidavit." Finally, Combined asserts that the NTLA's primary orientation is "anti-insurance," and that under these circumstances, former Chief Justice Gunderson's acceptance of the award constituted a violation of the code of judicial conduct and created an appearance of impropriety sufficient to warrant vacatur and reargument. We disagree.

As the responsive affidavits supplied by counsel for Ainsworth establish, in September of 1988, at the NTLA's

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[16] *See* Sierra Pac. Power Co. v. Rinehart, 99 Nev. 557, 665 P.2d 270 (1983); Davies v. Butler, 95 Nev. 763, 602 P.2d 605 (1979); Allen v. Anderson, 93 Nev. 204, 562 P.2d 487 (1977); State v. Kallio, 92 Nev. 665, 557 P.2d 705 (1976).

annual convention, former Chief Justice Gunderson was presented with a "special recognition award" for eighteen years of dedicated service to the People of the State of Nevada. Contrary to Combined's contention, the award was not in recognition for any unspecified support the former Chief Justice allegedly provided to the causes the NTLA espouses. The special award consisted of a modest plaque entitled, "Lifetime Dedication to Nevada's Justice System Award."[17] Additionally, while attending the award ceremony, the former Chief Justice paid for his own airfare, his own motel room and his own meals. Further, we deem it of little significance that counsel for Ainsworth are prominent members of the NTLA. It is our understanding that approximately one thousand members of the Nevada Bar belong to that organization, including members of the firm presently representing Combined on appeal, and from the affidavits submitted by Ainsworth,

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[17] We note that several attorneys in the firm presently representing Combined in this appeal are apparently also members of the NTLA, and, therefore, presumably had knowledge of the award at the time it was conferred. Moreover, the award in question was disclosed and reported in newspapers throughout the state at the time. In one such report, it was noted that former Chief Justice Gunderson had not only been honored by the NTLA, but he had also recently received the American Judicature Society's "Herbert Harley Award," as well the American Bar Association's annual award for excellence in judicial education. *See Gunderson Cited For His Dedication*, Las Vegas Sun, September 23, 1988; *see also Justice Gunderson Honored*, Reno Gazette-Journal, September 16, 1988; *Nevada Trial Lawyers Honor Gunderson*, Las Vegas Sun, September 16, 1988. Combined has not refuted the averments presented by Ainsworth that its counsel knew or had reason to know of the award prior to the issuance of this court's decision. It would appear, therefore, that Combined's counsel could have tendered a much more timely objection to the former Chief Justice's participation, but instead, did not object to these tenuous grounds until well after this court's opinion had issued. Accordingly, Combined's failure to tender a prompt objection constitutes a waiver of its right to raise the issue at this late date. *See* Jacobson v. Manfredi, 100 Nev. 226, 679 P.2d 251 (1984); Phillips v. Amoco Oil Co., 799 F.2d at 1472; Adair v. Adair 670 P.2d at 1003.

it appears that the NTLA is a much more broadly based organization than Combined portrays.

Ainsworth has also submitted the affidavits of numerous individuals who were present at the award dinner, and who deny that the former Chief Justice made the remark attributed to him by Combined and its anonymous, reluctant witnesses. One such affidavit characterizes Combined's summary of the former Chief Justice's remarks as "totally inaccurate" and as "an unfair gross distortion." In light of these refutations, Combined's bare, unsupported allegation is of little legal significance. *See* United States v. Hines, 696 F.2d 722, 729 (10th Cir. 1982) (where charge of bias in affidavit was based upon alleged remark of trial judge that an unnamed person allegedly overheard, court rejected the charge as wholly insufficient and noted that justice would be severely impeded if disqualification could be premised on such "scant submissions").

In support of its assertion that the acceptance of the award constituted a violation of the Canons of the Code of Judicial Conduct, Combined cites a "quiz" that appeared in the November 1, 1988, issue of the ABA Journal and an ABA Informal Ethics Opinion which the quiz purports to construe. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 86-1516 (1986). These authorities *suggest* that a "specialized bar association" which has a clearly definable litigation posture, may not ethically establish "a judicial award program which the association acknowledges could likely result in the selection of a judge whose philosophy is similar to that of the association." *Id.* As noted, however, the NTLA is a much more broadly based bar association than Combined attempts to portray. Further, as Ainsworth has observed, numerous jurists have been similarly honored by the NTLA and its parent organization, the Association of Trial Lawyers of America. Notably, the entire Nevada Supreme Court was similarly honored by the NTLA in 1986. Under these circumstances, it cannot be reasonably contended by

an objective person, knowing all the facts and circumstances, that by accepting such an award, any of these members of the judiciary, including the former Chief Justice, lent "the prestige of [their] office[s] to advance the private interests of others . . . ." Nor did they thereby "convey or permit others to convey the impression" that the organization was in a special position to influence them. *See* Nev. Code of Judicial Conduct Canon 2B; *see also* Nev. Code of Judicial Conduct Canon 5C(5)(a) (a judge may accept a gift incident to a public testimonial to him). Accordingly, we reject these allegations as wholly insufficient to support vacatur or reargument under NRS 1.225, the code of judicial conduct or the due process clause.[18]

Second, Combined asserts that a "substantial and pervasive appearance of impropriety" exists in this case because Laura FitzSimmons, the attorney who signed the amicus brief on behalf of the NTLA, simultaneously represented former Chief Justice Gunderson in another unrelated matter. Combined contends that vacatur and reargument are warranted because the former Chief Justice should have disclosed this attorney-client relationship or recused himself from participating in this appeal. *See* Potashnick v. Port City Const. Co., 609 F.2d 1101 (5th Cir.) (judge was disqualified from case where, during the litigation before him, judge was not only being represented in another matter by counsel for the *litigant*, but also had personal business dealings with that counsel), *cert. denied*, 449 U.S. 820 (1980); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1477 (1981) (a judge

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[18] Combined similarly complains that the counsel who signed the amicus brief on behalf of the NTLA in this appeal hosted an "invitation only" retirement party for former Chief Justice Gunderson on January 6, 1989. We conclude that any inference of impropriety arising out of said counsel's voluntary involvement in that event, after the former Chief Justice's retirement from this court, is wholly unreasonable. We reject this contention as entirely frivolous.

must recuse himself in cases in which a *litigant* is represented by the judge's own attorney). We disagree.

We are persuaded by the responsive affidavits of FitzSimmons and other members of the NTLA amicus curiae committee that FitzSimmons' involvement in *Ainsworth* was extremely limited and cannot reasonably support any inference of impropriety. For example, the affidavits establish that FitzSimmons did not author the amicus brief, but merely signed it, at the request of the chairman of the NTLA amicus curiae committee, because she was the only Northern Nevada member of the committee available who could do so in time to insure that the brief was promptly filed with the clerk of this court in Carson City. Further, FitzSimmons avers that she "knew very little about the facts of the [Ainsworth] case," that she had "absolutely no motive" to attempt to affect the outcome of the appeal, that she did not participate in and only attended a portion of the oral argument, and that she "never discussed this case with Chief Justice Gunderson before his retirement from the court."[19]

Moreover, although Combined has cited authorities which suggest that a judge should not participate in a case in which the judge's own attorney also represents a "litigant" appearing in the case, Combined has cited no authorities establishing that an attorney's appearance on behalf of an amicus curiae constitutes representation of a "litigant." In our view, it cannot be reasonably contended that the NTLA appeared in this matter as a "litigant." Rather, the NTLA was merely allowed to file a brief in this appeal as a "friend of the court." Nor can it be reasonably inferred, under the facts cited above, that FitzSimmons' act of signing the NTLA brief and attending a portion of the oral

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[19] We also note that FitzSimmons' representation of former Chief Justice Gunderson in the above referenced unrelated matter concluded in April of 1987, after the NTLA brief was filed in this case, but before this case was orally argued, and well before the opinion was filed.

argument amounted to representation of a "litigant" sufficient to create a disqualifying appearance of impropriety.

Lastly in this regard, we note that FitzSimmons has averred that her husband serves on the Board of Governors of the State Bar of Nevada with one of Combined's present co-counsel on appeal, as well as with a member of a firm that remains one of Combined's counsel of record. On information and belief, FitzSimmons avers that her representation of former Chief Justice Gunderson was discussed among the members of the Board and was known to Combined's counsel well before this appeal came before this court. Once again, however, Combined's counsel have not refuted the averment and have conspicuously refrained from any comment respecting when they became aware of the alleged factual basis for their complaints of impropriety and bias. Accordingly, we conclude that Combined has not only asserted allegations that are legally insufficient to support the relief requested under NRS 1.225, the code of judicial conduct or the due process clause, but its failure to tender a prompt objection constitutes a waiver of its right to raise the issue at this point in these proceedings. *See* Jacobson v. Manfredi, 100 Nev. at 230, 679 P.2d at 254; Phillips v. Amoco Oil Co., 799 F.2d at 1472; Adair v. Adair, 670 P.2d at 1003.

D. Combined's allegations respecting former Chief Justice Gunderson's involvement in unrelated litigation.

Combined further maintains that an appearance of impropriety exists because of former Chief Justice Gunderson's alleged "undisclosed relationship" with counsel for Ainsworth and with attorney FitzSimmons in unrelated litigation pending in the state district court at the time this case initially came before us. *See* Flangas v. Manoukian, Case No. A208009, Eighth Jud. Dist. Ct., Clark Co. (1986). The unrelated conspiracy litigation in question has a tortuous history that has no substantive connection what-

soever with the instant matter. *See generally* In re Ross, 99 Nev. 1, 656 P.2d 832, *reh'g denied*, 99 Nev. 657, 668 P.2d 1089 (1983). Nonetheless, Combined attempts to relitigate and rehash issues which have been long since formally adjudicated in proceedings that are not even remotely connected with the instant case. In essence, however, Combined alleges that an appearance of impropriety exists in this case because one of Ainsworth's counsel, Peter C. Neumann, represented the plaintiff Flangas in civil litigation in the state court, and because former Chief Justice Gunderson, represented by attorney FitzSimmons, successfully resisted an improper attempt by the defendant in that same litigation to subpoena certain evidence under the former Chief Justice's control.[20]

More specifically, Combined speculates that (1) the former Chief Justice was allied with attorneys Neumann and FitzSimmons in pursuit of a common goal; (2) Neumann *may have* entered the *Flangas* case at the urging of former Chief Justice Gunderson; and (3) Neumann, FitzSimmons and the former Chief Justice *may have* discussed the Ainsworth case in private, undisclosed interviews respecting

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[20] The subpoena in question, which the district court quashed as "invalid, burdensome, and oppressive," sought evidence that the district court concluded had been entrusted to former Chief Justice Gunderson in *custodia legis* by the federal court. *See* Flangas v. Manoukian, Case No. A208009, Eighth Jud. Dist. Ct., Clark Co. (orders filed November 7, 1986, and March 20, 1987). Combined argues that former Chief Justice Gunderson was not entrusted with any evidence by the federal court in *custodia legis*. We may appropriately take judicial notice of the public record of the state district court proceedings, and we have done so. *See* Jory v. Bennight, 91 Nev. 763, 542 P.2d 1400 (1975); Cannon v. Taylor, 88 Nev. 89, 493 P.2d 1313 (1972). Our review of the pertinent orders entered by the district court reveals that former Chief Justice Gunderson's recital of his role in that litigation is fully supported by the public record of the state district court proceedings and that the district court previously resolved this and other issues raised by Combined, respecting former Chief Justice Gunderson's role in that litigation, adversely to the position now espoused by Combined.

the *Flangas* litigation. These speculative, conclusory allegations, however, are insufficient on their face to establish legally cognizable grounds for recusal. *See* Goldman v. Bryan, 104 Nev. ___, 764 P.2d 1296 (1988).

Moreover, the allegations are refuted by the affidavits and verified responses of the concerned parties. For example, the averments of both attorney Neumann and the former Chief Justice indicate that they were not "allied in the pursuit of a common goal," and that they did not discuss the *Ainsworth* case in any interviews conducted in connection with the *Flangas* case. Further, the affidavits of Neumann and Flangas deny that Neumann entered the litigation at the urging of the Chief Justice; rather, it appears that Neumann was recommended to Flangas by an attorney in private practice. Accordingly, we reject Combined's contentions in this regard as wholly insufficient to establish any disabling bias or any reasonable inference of impropriety.[21]

E. Combined's allegations respecting Mrs. Gunderson and Peavine, Inc.

In 1985, counsel for Ainsworth, Peter C. Neumann, formed Peavine, Inc., for the purpose of obtaining an FCC permit to operate a new television station in the Reno, Nevada area. Neumann withdrew Peavine's application to

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[21] We further note that the unrelated litigation in question was highly publicized within the state and involved, among other things, certain actions of the Board of Governors of the State Bar of Nevada. As previously noted, one of Combined's present co-counsel on appeal, as well as a member of the firm which represented Combined below, are members of the Board of Governors. Thus, it strains credulity to suppose that Combined's counsel were not aware of the various individuals and attorneys involved in the *Flangas* case, well in advance of the date this case was argued or decided. Under these circumstances, we are persuaded that Combined waived its right to tender an objection on these grounds at this late date. *See* Jacobson v. Manfredi, 100 Nev. at 230, 679 P.2d at 254; Phillips v. Amoco Oil Co., 799 F.2d at 1472; Adair v. Adair, 670 P.2d at 1003.

the FCC and dissolved the corporation later that same year when it became clear that it had little chance of successfully competing against other applicants for the permit. Apparently, with the intention of being repaid by the corporation if it became successful, Neumann personally paid the expenses incident to the formation of the corporation and incurred as a result of filing the FCC application. Neumann avers, however, that during its short-lived existence, Peavine had no assets or liabilities, no stock was ever issued by Peavine to any person, and "no funds or monies were ever received" by the corporation or any of the individuals involved. Among others, former Chief Justice Gunderson's wife and brother-in-law were two of the individuals involved in Peavine. Combined alleges that Mrs. Gunderson's involvement in the Peavine venture "supplies an additional ground for disqualification of Justice Gunderson, vacatur, and rehearing in this case." We disagree.

Combined asserts that former Chief Justice Gunderson should have disclosed "his wife's financial dealings with Neumann in this case" because Nevada is a community property state and Mrs. Gunderson's "interest in and exposure to liability of the debts of Peavine would presumptively be shared by her husband." We note, however, that Canon 6 of the Nevada Code of Judicial Conduct only requires a judge to report "extrajudicial" income. Further, Canon 6C provides that compensation or income of a judge's spouse, attributed to the judge because of community property laws, "*is not extrajudicial compensation.*" Thus, even if Mrs. Gunderson had profited in some way from her association with Peavine, Canon 6 imposed no obligation upon the former Chief Justice to disclose his wife's involvement. Contrary to Combined's contentions, therefore, the Peavine venture does not establish that the former Chief Justice violated any code provisions relating to his duties to disclose the financial dealings of his spouse. *See* Nev. Code of Judicial Conduct Canon 6. Nor do Com-

bined's speculative allegations demonstrate that the former Chief Justice violated Canon 3C(2) by failing to keep himself informed of the financial dealings of his spouse.

Moreover, the Peavine venture was abandoned long before this appeal was docketed in this court. There was no business relationship in existence at the time this case came before this court which could have been affected by the outcome of this appeal or created an appearance of impropriety. Thus, the legal authorities cited by Combined are clearly distinguishable from the instant situation. *Cf.* Liljeberg v. Health Services Acquisition Corp., ___ U.S. ___, 108 S.Ct. 2194 (1988) (judge had fiduciary interest in litigation before him, sufficient to warrant his disqualification under 28 U.S.C. § 455, where, *at the time of trial*, judge was trustee for university that had substantial financial interest in the outcome of the litigation); Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) (vacation of state supreme court opinion required, where, *at the time opinion was issued*, state supreme court justice had a direct, pecuniary interest in outcome of appeal); Potashnick v. Port City Const. Co., 609 F.2d 1101 (5th Cir.) (judge was disqualified from case where, *during the litigation before him*, judge was not only being represented in another matter by counsel for the litigant, but judge had personal business dealings with that counsel as well), *cert. denied*, 449 U.S. 820 (1980). Further, Combined's allegations completely fail to establish that, during his tenure on this court, former Chief Justice Gunderson *ever had any direct, ongoing pecuniary interest* in the outcome of any litigation before this court, including the *Ainsworth* litigation. *See* Nev. Code of Judicial Conduct Canons 3C(1)(d) and 6C; NRS 1.225(2)(a). The long abandoned business link between Neumann and Mrs. Gunderson is simply too remote in time as well as in substance from the *Ainsworth* case. *See* In re Drexel Burnham Lambert Inc., 861 F.2d 1307 (2nd Cir. 1988) (where party to litigation before judge had been retained by a firm under contract with

judge's wife's family to arrange financing for sale of family business, judge's connection with party was *too remote* to warrant recusal even though wife was expected to receive $30 million from the sale).

We conclude, therefore, that Combined's allegations are wholly insufficient, under NRS 1.225, the Nevada Code of Judicial Conduct, or the due process clause, to establish that former Chief Justice Gunderson had any direct disqualifying interest in this litigation or that his impartiality toward the litigants might reasonably be questioned.[22]

IV. COMBINED'S MOTION FOR AN EVIDENTIARY HEARING AND DISCOVERY

Combined has moved this court for an evidentiary hearing and discovery on its factual allegations of bias and

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[22] Combined also contends that Neumann's personal efforts and services on behalf of Peavine, Inc., constituted a "gift, bequest, favor or loan" to Mrs. Gunderson under Nevada Code of Judicial Conduct Canon 5C. In light of the fact that Mrs. Gunderson never received anything of any real, tangible worth as a result of her involvement in Peavine, we conclude that Neumann's efforts on behalf of Peavine cannot be reasonably characterized as a "gift" under Canon 5C, and do not establish any reasonable inference of favoritism or impropriety. Combined also alleged that there was no public record of Mrs. Gunderson's business relationship with Neumann and Peavine, Inc. Although there is evidence that this assertion may have been knowingly false, it is clear from the record that such a relationship was revealed in a public notice published in Reno's largest newspaper of general circulation on four separate occasions. Moreover, Combined's bald assertion that Mrs. Gunderson's involvement with Neumann and Peavine, Inc., and Justice Gunderson's failure to disclose the benefits from such involvement, constituted violations of Nevada's Judicial Code is specious. At most, Mrs. Gunderson may have had an expectancy of value if Neumann's efforts as an attorney had borne fruit for Peavine, Inc. They did not. Mrs. Gunderson received neither value nor liability. Whatever expectancy she may have had did not materialize. Furthermore, if Mrs. Gunderson had received compensation in the form of stock or income for her efforts, Justice Gunderson's community property interest in any such emoluments would not have been reportable by him under the Judicial Code. *See* Canon 6C.

impropriety. As discussed above, however, we have concluded that Combined's factual allegations present no legally competent grounds supporting a reasonable inference of bias, prejudice or impropriety under NRS 1.225, the Nevada Code of Judicial Conduct or the due process clause of the constitution. Under such circumstances, "summary dismissal of the instant challenge is warranted as a matter of law, and no formal hearing is required." *See* In re Petition of Dunleavy, 104 Nev. at ___, ___ P2.d at ___ (Adv. Op. No. 134 at 5). Further, we are persuaded that most, if not all, of the factual allegations Combined has asserted in support of its motions were known or should have been known to Combined's counsel well before this court issued its opinion. Such prior notice forecloses any right Combined might have otherwise asserted to an evidentiary hearing or discovery. Moreover, as previously noted, any issue respecting former Chief Justice Gunderson's *present* disqualification has been rendered moot by his retirement. Therefore, the hearing before unchallenged justices that is provided under NRS 1.225(4) is inapplicable and, contrary to Combined's suggestion, summary rejection of its factual allegations will not deny Combined any right to established adjudicatory procedures.

Finally in this regard, Combined asserts that a hearing and discovery are necessary because it has a right to inquire into the "origin, history and role of the 'bench memo' which was prepared before oral argument" by former Chief Justice Gunderson's law clerk. Combined, however, has established no factual circumstances or legal cause why it should have the right to inquire into the confidential work product of this court. Nor has our independent inquiry into the circumstances surrounding the preparation of that memorandum revealed any. Even if the former Chief Justice did influence his law clerk's preparation of that memorandum, such interaction between a justice and his law clerk is entirely proper. Thus, Combined has neither alleged nor demonstrated any facts or circumstances enti-

tling it to an evidentiary hearing on this question. In any event, our inquiry into the matter reveals that the contents of the law clerk's memorandum in the *Ainsworth* case resulted entirely from that individual's independent research and analysis, free of any direct influence from former Chief Justice Gunderson. Accordingly and in light of the above, we deny Combined's motion for an evidentiary hearing or discovery.

V. AINSWORTH'S MOTION FOR SANCTIONS

Ainsworth requests this court to impose sanctions upon Combined and its counsel for abusing the appellate processes of this court and for knowingly filing false and frivolous claims for the sole purpose of delay. *See* NRAP 38. As discussed above, we are persuaded that counsel for Combined has tendered a number of entirely frivolous allegations. Further, the manner in which Combined has litigated this matter in this court clearly suggests that it has attempted to misuse the appellate processes of this court for the sole purpose of delaying a final resolution of this litigation. Nonetheless, we have concluded that Ainsworth's motion for sanctions should be denied.

As previously noted, the punitive damage award in this matter is the largest ever affirmed by this court. In light of the substantial penalty that Combined has already incurred, we are reluctant to impose further punishment against the company in the form of sanctions, and decline to do so.

For the reasons expressed above, we hereby deny the petitions and motions presently pending in this docket, and we direct the clerk of this court to issue the remittitur forthwith.

/s/ Young, C.J.
Young

/s/ Steffen, J.
Steffen

/s/ Springer, J.
Springer

MOWBRAY, J., concurring:

I concur in the result only.

This case is a simple lawsuit.

It was tried to a jury and decided by a jury. The jury heard the evidence. The district judge properly charged the jury. At the conclusion of the presentation of the evidence the jury found in favor of appellant Ainsworth and awarded both compensatory and punitive damages. The evidence supports the jury's verdict.

Respondent, Combined Insurance Company of America, has presented nothing in its petition for rehearing now before us that challenges in any way the integrity of the jury's verdict. Therefore, I would let the jury's verdict stand and I would deny respondent's petition for rehearing. I would also deny Ainsworth's petition for rehearing. Finally, I reject as wholly meritless Ainsworth's request for sanctions.

/s/ Mowbray, J.
Mowbray

APPENDIX B

NRS 1.225 and the Nevada Code of Judicial conduct provide:

1.225 Grounds and procedure for disqualifying supreme court justices.

1. A justice of the supreme court shall not act as such in an action or proceeding when he entertains actual bias or prejudice for or against one of the parties to the action.

2. A justice of the supreme court shall not act as such in an action or proceeding when implied bias exists in any of the following respects:

(a) When he is a party to or interested in the action or proceeding.

(b) When he is related to either party by consanguinity or affinity within the third degree.

(c) When he has been attorney or counsel for either of the parties in the particular action or proceeding before the court.

(d) When he is related to an attorney or counselor for either of the parties by consanguinity or affinity within the third degree.

3. A justice of the supreme court, upon his own motion, may disqualify himself from acting in any matter upon the ground of actual or implied bias.

4. Any party to an action or proceeding seeking to disqualify a justice of the supreme court for actual or implied bias shall file a charge in writing, specifying the facts upon which such disqualification is sought. Hearing on such charge shall be had before the other justices of the supreme court.

5. Upon the disqualification of a justice of the supreme court pursuant to this section, a district judge shall be

designated to sit in his place as provided in section 4 of article 6 of the constitution of the State of Nevada.

6. No person shall be punished for contempt for making, filing or presenting a charge for disqualification pursuant to subsection 4.

(Added to NRS by 1957, 521)

PART V. NEVADA CODE OF JUDICIAL CONDUCT

CANON 1

A judge should uphold the integrity and independence of the judiciary.

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective without any limitation upon the supreme court in the exercise of its powers of general superintendence, whether constitutional, statutory or inherent, in areas not delineated in the Code.

[Added; effective July 1, 1977.]

CANON 2

A judge should avoid impropriety and the appearance of impropriety in all his activities.

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

[Added; effective July 1, 1977.]

CANON 3

A judge should perform the duties of his office impartially and diligently.

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative responsibilities.

(1) A judge should be faithful to the law and maintain professional competence. He should be unswayed by partisan interest, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and except as authorized by law, neither initiate nor consider ex parte or other communications intended to influence his judicial action concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. Notice need not be given where the advice is confined to case citations or other abstract legal references.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

(7) Proceedings in court should be conducted with fitting dignity and decorum. As provided by law, a court during any and all court proceedings under the jurisdiction of such court, on its own motion or on the motion of an attorney representing any interested party, or at the request of the witness testifying under subpena, shall prohibit by minute order any person, firm, association or corporation from broadcasting, televising, or taking motion pictures, or arranging for the broadcasting, televising, or taking of motion pictures of, such proceedings. The taking of still photographs in the courtroom, during sessions of the court or recesses between sessions, should be regulated by local rule or practice.

B. Administrative responsibilities.

(1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

(3) A judge should report dishonesty, or other serious unprofessional conduct of a judge or lawyer to the appropriate disciplinary body.

(4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism.

He should not approve compensation of appointees beyond the fair value of services rendered.

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) He has served as lawyer for any of the parties or has been a material witness in the particular action or proceeding before the court; or a lawyer with whom he previously practiced law was during such association a material witness concerning the matter;

(c) A lawyer with whom he previously practiced law served during such association as a lawyer in the particular action or proceeding before the court;

(d) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(e) He knows that he or his spouse, or a person within the third degree of relationship to either of them:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Has an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is likely to be a material witness in the proceeding.

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable

effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(3) For the purpose of this section:

(a) The degree of relationship is calculated according to the civil law system;

(b) "Fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "Financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participated in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

D. Remittal of disqualification.

(1) A judge disqualified by the terms of Canon 3C(1)(c), Canon 3C(1)(d) or Canon 3C(1)(e) may, instead of with-

drawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing or on the record in open court that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

(2) Canon 3C(1)(e)(ii) shall not apply to the presentation of ex parte or uncontested matters except in fixing attorneys' fees.

[Added; effective July 1, 1977.]

CANON 4

A judge may engage in activities to improve the law, the legal system, and the administration of justice.

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that his time permits, he is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities:

A. He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

B. He may appear at a public hearing before an executive or legislative body or official on matters concerning

the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official on such matters.

C. He may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but should not individually solicit funds. He may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

[Added; effective July 1, 1977.]

CANON 5

A judge should regulate his extrajudicial activities to minimize the risk of conflict with his judicial duties.

A. Avocational activities.

A judge may write, lecture, teach and speak on nonlegal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.

B. Civic and charitable activities.

A judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. A judge may serve as an officer, director, trustee, or nonlegal advisor of a bona fide educational, religious, charitable, fraternal, or civic organization subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would

ordinarily come before him or will be regularly engaged in adversary proceedings in any court.

(2) A judge should not individually solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of his office for that purpose, but he may be listed as an officer, director, or trustee of such an organization. A judge may, however, join a general appeal on behalf of an educational, religious, charitable, or fraternal organization, or speak on behalf of such organization.

C. Financial activities.

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, or exploit his judicial position.

(2) A judge should not involve himself in frequent transactions with lawyers or persons likely to come before the court on which he serves.

(3) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not participate in, nor permit his name to be used in connection with, any business venture or commercial advertising program, with or without compensation, in such a way as would justify a reasonable inference that the power or prestige of his office is being utilized to promote a business or commercial product. A judge should not serve as an officer, director, manager, or employee of a business affected with a public interest including, without limitation, a financial institution, insurance company, or public utility.

(4) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments

and other financial interests that require frequent disqualifications.

(5) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor or loan from anyone except as follows:

(a) A judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) A judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) A judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, and, if its value exceeds $250, the judge reports it in the same manner as he reports compensation in Canon 6C.

(6) For the purposes of this section "member of his family residing in his household" means any person who resides in a judge's household and who is a relative of the judge or is treated by the judge as a member of his family.

(7) A judge is not required by this Code to disclose his income, debts, or investments, except as provided in this Canon and Canons 3 and 6.

(8) Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial

dealings or for any other purpose not related to his judicial duties.

D. Fiduciary activities.

A judge should not serve as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of his family, and then only if such service will not interfere with the proper performance of his judicial duties. "Member of his family" includes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. As a family fiduciary the judge is subject to the following restrictions:

(1) He should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which he serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to him in his personal capacity.

E. Arbitration.

A judge should not act as an arbitrator or mediator except in the performance of his judicial duties.

F. Practice of law.

A judge should not practice law except as permitted by law.

G. Extrajudicial appointments.

A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his country, state or locality on ceremonial occasions or

in connection with historical, educational, cultural, and community service activities.

[Added; effective July 1, 1977.]

CANON 6

A judge should regularly file reports of compensation received for quasi-judicial and extrajudicial activities.

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extrajudicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

A. Compensation.

Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

B. Expense reimbursement.

Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

C. Public reports.

A judge should report the date, place and nature of any activity for which he received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extrajudicial compensation to the judge. His report should be made annually and should be filed on or before April 30 of each year as a public document in the office of the clerk of the supreme court.

[Added; effective July 1, 1977.]

CANON 7

A judge should refrain from political activity inappropriate to his judicial office.

A. Political conduct in general.

(1) A judge or a candidate for election to judicial office should not:

(a) Act as a leader or hold any office in a political organization;

(b) Make speeches for a political organization or candidate or publicly endorse a candidate for nonjudicial office;

(c) Solicit funds for a political organization or candidate;

(2) A judge should not become a candidate in an election for a nonjudicial office, except as the constitution of Nevada permits.

B. Campaign conduct.

(1) A candidate, including an incumbent judge, for a judicial office:

(a) Should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;

(b) Should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon;

(c) Should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; indicate his views on pending or impending litigation; or misrepresent his identity, qualifications, present position, or other fact. He may campaign on the basis of his ability, experience, and record; and may answer allegations directed against his record in office.

(2) A candidate, including an incumbent judge, for a judicial office, may solicit funds for his campaign no earlier than 180 days before the primary election and no later than 90 days after the last election in which he participates during the election year. A candidate should not use or permit the use of campaign contributions for purposes unrelated to the campaign.

(3) A candidate, including an incumbent judge, shall comply with the provisions of the Nevada Election Campaign Practices Act, as adopted in 1975 and now appearing as NRS 294A.010 et seq.

[Added; effective July 1, 1977.]

Attest: A full, true and Correct Copy
Clerk of the Supreme Court

By /s/ Jeanne C. Richards Chief Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 17625

THOMAS AINSWORTH,

Appellant,

vs.

COMBINED INSURANCE COMPANY OF AMERICA,

Respondent.

FILED

OCT 26 1988

/s/ Jeanne C. Richards
JUDITH FOUNTAIN
CLERK, SUPREME COURT

Appeal from a Judgment Notwithstanding the Verdict, Second Judicial District Court, Washoe County; Deborah A. Agosti, Judge.

Reversed.

Peter Chase Neumann, Reno; Bradley & Drendel, Reno,
for Appellants,

Mortimer, Sourwine, Mousel, Sloane & Knobel, Reno; Lionel, Sawyer & Collins, and M. Kristina Pickering and Steve Morris, Las Vegas,
for Respondent,

Lambrose, FitzSimmons & Perkins, Carson City,
for Amicus Curiae.

OPINION

By the Court, GUNDERSON, C.J.

On January 14, 1982, Thomas Ainsworth was a healthy, working man who also served his community as a member of the Sparks City Council. His only health concerns involved occasional "dizzy spells," which he had experienced at irregular intervals over a period of several years. Within twenty-four hours, Thomas Ainsworth's life was shattered. Because of an accident which occurred during the administration of an angiogram, Thomas suffered a stroke. He immediately went into a coma, which continued for seven days. He was still 100% disabled after six months. The stroke did not kill him, but some of its effects are permanent and devastating. He will never walk or talk as well as he previously did.

While Thomas was fighting for his life, his wife, Evelyn Ainsworth, was fighting a different battle. She attempted to collect benefits for Thomas under two accident policies issued by the respondent, Combined Insurance Company of America (Combined). The Ainsworths had been advised by agents of Combined that their accident policies would protect them in the event of "any conceivable accident." Relying on this promise, and the advice of Thomas' physician, Evelyn sent in an accident claim.

The insurance adjuster who received the claim denied it immediately, without any investigation whatsoever, because the doctor's report hypothesized that the stroke may have been caused by the disruption of atheromatous plaque during the angiogram. The adjuster focused upon this one sentence in the report, and concluded that the development of arterial plaque had contributed to Thomas' stroke. Since the policy excluded any accident which was contributed to by disease, Combined refused to pay benefits under the policies. These benefits amounted to $9,600.

Evelyn was distressed by the denial, but decided to resubmit the claim on advice from her nephew, who was a

physician, and from the Combined salesman who came by in June to collect the next biannual premium. Combined's salesman discussed the Ainsworths' financial condition with Evelyn, and encouraged her to resubmit her claim. He even promised to put a hold on the premium check while the matter was cleared up.

The claim was resubmitted, along with a doctor's report which corrected the earlier hypothesis. The doctor stated that the results of the angiogram clearly showed that Thomas' blood vessels were normal and were not built up with atheromatous plaque. He affirmed that the stroke was entirely accidental, and could have resulted from numerous causes.

At this time, Combined sent its file to its medical consultant, Dr. Goldfinger. The consultant was provided, however, only with the first doctor's report and records from Washoe Medical Center, where Thomas had been transferred after the accident. The consultant's one-line report stated that the stroke was the result of disease. After receiving the consultant's report, Combined again denied the claim, without evaluating the second doctor's report or the record summaries from the Veteran's Administration Hospital, where the accident occurred. Combined never made further inquiry into the claim, never telephoned or wrote to the doctors, and never obtained a copy of the operating report or the angiogram.

In November, 1982, Evelyn submitted Thomas' claim for the third time, accompanied by yet another doctor's report explaining that Thomas had been the victim of an accident. By this time, the claim file included more records from the V.A. Hospital. The file was sent to Dr. Goldfinger for a second evaluation, but on the same day Combined sent Evelyn a third denial letter. Two days later, Dr. Goldfinger again recommended denying the claim, because the angiogram had been ordered for the purpose of diagnosing

Thomas' dizzy spells. Thus, according to Goldfinger, the loss was not "purely accidental."

In a further effort to obtain the badly-needed policy benefits, Evelyn submitted the claim for the fourth time in February, 1983. With her claim she included a letter from her husband's doctor which confirmed that the angiogram "revealed no pre-existing vascular disease." In response to this claim, Combined offered to "compromise" by paying the Ainsworths $1,940 in exchange for a release of all claims. Evelyn understandably refused this offer, and wrote a fifth letter, requesting payment of the full benefits under the two policies, a total of $9,600. Combined still refused to pay.

The Ainsworths then sued Combined, seeking the payment of benefits and compensatory and punitive damages. The jury awarded the benefits, $200,000 in compensatory damages, and $5,939,500 in punitive damages. Combined moved for a judgment notwithstanding the verdict and for a new trial. The district court denied the latter motion, but granted the former, totally eliminating the award of punitive damages. For the reasons expressed in this opinion, we reverse the judgment of the district court and reinstate the jury's verdict. The denial of the motion for new trial is affirmed.

SUBSTANTIAL EVIDENCE

The function of this court in evaluating a grant of judgment notwithstanding the verdict is to determine whether the jury's verdict is supported by substantial evidence. The party favored by a verdict is entitled to have the evidence interpreted in the manner most favorable to him, and gains the benefit of every inference of fact fairly deductible from the evidence. Stackiewicz v. Nissan Motor Corp., 100 Nev. 443, 686 P.2d 925 (1984); Dudley v. Prima, 84 Nev. 549, 445 P.2d 31 (1968). Judgment notwithstanding the verdict is inappropriate when there is any substantial evidence to

support that verdict. Jacobson v. Manfredi, 100 Nev. 226, 679 P.2d 251 (1984).

A jury may award punitive damages where the defendant has been guilty of fraud, malice, or oppression. NRS 42.010. We conclude that the punitive damages award in this case is supported by substantial evidence of oppression on the part of the defendant, Combined. Therefore, we reverse the decision of the district court.

Oppression has been defined as "a conscious disregard for the rights of others which constitute[s] an act of subjecting plaintiffs to cruel and unjust hardship." Roth v. Shell Oil Company, 185 Cal. App. 2d 676, 682 (Cal. App. 1960); *accord* Jeep Corp. v. Murray, 101 Nev. 640, 650, 708 P.2d 297, 304 (1985). Our decisions have recognized that such a "conscious disregard" may support an award of punitive damages. Leslie v. Jones Chemical Co., 92 Nev. 391, 551 P.2d 234 (1976); Nevada Cement Co. v. Lemler, 89 Nev. 447, 514 P.2d 1180 (1973). The Ainsworths presented substantial evidence that Combined had consciously and deliberately ignored their rights to the payment of benefits.

The initial claim was denied immediately without any investigation, although Combined claimed in its letter that it had been given "careful consideration." In fact, Combined made no independent inquiry concerning Thomas' accident, whether by telephone or letter. The sum total of its investigative effort was to send a $5 check to each of two hospitals, accompanied by a records request form. This effort was clearly inadequate to support Combined's assertion that it handled the claim properly. Furthermore, we are not impressed by Combined's alleged lack of knowledge concerning the Ainsworths' precarious finances. From the outset, Combined knew that Thomas Ainsworth was a 59-year-old male who had suffered a stroke and was comatose for seven days. This information was more than adequate to give Combined notice that its insured, who

had paid premiums for thirteen years, had an unqualified and urgent need for the benefits of the accident policies. Additionally, five times within eighteen months, the insured's wife requested payment, indicating clearly that the policy benefits of $9,600 were urgently needed.

Combined's cumulative response to the next three claim submissions was also sadly inadequate. In spite of the seriousness of the accident, Combined failed to obtain accurate and complete medical records. Although it used the services of a medical consultant, the consultant was not provided with adequate information. When Evelyn sent additional medical reports, these were initially ignored because Combined's employees felt they merely repeated the statements contained in the initial report. After further consideration of the reports and a second outside consultation, Combined continued to deny the claim simply because the angiogram was ordered as a diagnostic tool. We fail to understand why an accident cannot occur during the administration of a medical test. The stroke was an unplanned and unexpected result of the angiogram. The fact that Thomas underwent the procedure on the orders of his doctor is irrelevant. If Thomas had been hit by a truck on his way to the doctor's office, the accident would not be the result of a disease, in spite of the fact that Thomas was engaged in seeking medical treatment at the time.

Combined's obstinate and unjustified refusal to pay, in our opinion, constitutes oppression as contemplated by the statute. The evidence establishes that the Ainsworths were in desperate need of funds, and that Combined had reason to know of their dire circumstances. The record clearly supports an inference that Combined consciously disregarded the rights of its insured by clinging to its restrictive definition of "accident" as used in its policy.

This intransigent resistance is remarkable in light of the written inducements offered to obtain renewal premiums

from Thomas and Evelyn Ainsworth. As stated above, they had carried insurance with Combined since 1969. At trial, documents were introduced which showed that Combined sent "good news letters" to its insureds, assuring them they were covered in the event of "any conceivable accident," incurred in "any activity whatsoever." When the salesman arrived to collect the premiums, he reminded the Ainsworths of the benefits they were receiving, as explained in the news letters. In fact, the salesman's manual defined "accident" simply as "an event that is unforseen [sic.] and unexpected." Given such information, the Ainsworths could reasonably expect that an unforeseeable, unexpected accident which occurred as a result of a medical test would be covered by their policy. *See* National Union Fire Ins. v. Reno's Exec. Air, 100 Nev. 360, 682 P.2d 1380 (1984); Catania v. State Farm Life Ins. Co., 95 Nev. 532, 598 P.2d 631 (1979).

The relationship of an insured to an insurer is one of special confidence. A consumer buys insurance for security, protection, and peace of mind. Rawlings v. Apodaca, 726 P.2d 565 (Ariz. 1986)(*en banc*). The insurer is under a duty to negotiate with its insureds in good faith and to deal with them fairly.[1] The insurer may not rely on its own ambiguous contract as the sole basis for denial. *Rawlings, supra*, at 572, *see also* Sullivan v. Dairyland Ins. Co., 98 Nev. 364, 649 P.2d 1357 (1982). To allow such conduct would only encourage ambiguous contracts. Indeed, our law has held that any ambiguity will be construed against the insurance company, and rightly so. N. American Life & Cas. Co. v. Gingrich, 91 Nev. 491, 538 P.2d 163 (1975). Negotiations between a wealthy, sophisticated commercial venturer and a naive consumer cannot be of equal strength.

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[1] The covenant of good faith and fair dealing is implied into every commercial contract. NRS 104.1203. In Nevada, insurance contracts are directly regulated by statutes which prohibit deceptive advertising and other unfair trade practices. See NRS 686A.020; 686A.030(1); 686A.040; 686A.310(1)(b), (c), (e), and (f).

For that reason, the law attempts to render an ambiguous contract fair by making the drafter responsible for ambiguity. The insurance industry is heavily regulated by the state, because it is an important public trust. Along with the profits obtained from insurance premiums, insurers must accept the obligations of good faith and fair dealing imposed by law.

Furthermore, even if the evidence is not sufficient to prove that Combined acted oppressively in avoiding the payment of benefits, we note that in the past we have found malice in fact when the defendant has engaged in wilful and intentional conduct, done in reckless disregard of its possible results. *Nevada Cement, supra*, 89 Nev. at 451, 514 P.2d at 1183; Nevada National Bank v. Huff, 94 Nev. 506, 582 P.2d 364 (1978). Combined's conduct was neither accidental nor simply negligent. In spite of five requests made in eighteen months, in spite of the serious nature of its insured's accident, it conducted no independent investigation and utterly failed to evaluate fairly the medical evidence it possessed in its claim file.

Therefore, we conclude that the jury's award of punitive damages was supported by substantial evidence.

PUNITIVE DAMAGES

Traditionally this court has held that the amount of a punitive damages award was subjective, and therefore best left to the jury's determination. Phillips v. Lynch, 101 Nev. 311, 704 P.2d 1083 (1985); Miller v. Schnitzer, 78 Nev. 301, 371 P.2d 824 (1962). Recently we have attempted to define the allowable limits of punitive damages in a more objective fashion. Ace Truck v. Kahn, 103 Nev. 503, 746 P.2d 132 (1987). *Ace Truck* described several factors which contribute to an appellate evaluation of a punitive damages award. We conclude, however, that none of these factors prevent us from affirming the award in this case.

First, we note that the financial position of the defendant is still relevant to the determination of the amount of the punitive damages award. The wealth of a defendant is directly relevant to the size of an award, which is meant to deter the defendant from repeating his misconduct as well as punish him for his past behavior. *See* Midwest Supply, Inc. v. Waters, 89 Nev. 210, 510 P.2d 876 (1973). We note that the award in this case, while large, amounts to only 5% of Combined's 1985 net operating gain. The award constitutes only .04% of Combined's 1985 total assets. Since we find its business conduct totally unacceptable, we are reluctant to disturb the jury's determination that a sizable award is necessary to deter Combined from pursuing its inappropriate methods.

Second, we conclude that the culpability and blameworthiness of Combined is considerable, with few mitigating circumstances. Despite repeated requests by the insured, all of which were accompanied by medical reports, Combined failed to investigate the claim properly. It refused to pay on the basis of one inaccuracy in the initial report, an inaccuracy which was corrected by three later reports. Combined must take full responsibility for the handling of the claim, and its own obstinate refusal to take more appropriate action.

Third, we look to the vulnerability of, and injury suffered by, the offended party. Thomas Ainsworth was in a highly vulnerable position as the result of the devastating consequences of his stroke. Unable to communicate effectively, he depended on the efforts of his wife, a woman who was inexperienced in handling business matters. Sufficient evidence was produced at trial to show that Thomas was permanently impaired in his speaking ability by the lack of crucial funds to pay for speech therapy at the proper time during his recovery. Thomas' injuries prompted the jury to make a substantial award of compensatory damages. These injuries also support an award of punitive damages.

Another factor is the offensiveness of the punished conduct when compared to societal values of justice and propriety. As discussed above, insurance is a special kind of commercial activity. The insurer is under a duty to treat its policyholders fairly. The obstinate, unjustified refusal to pay a legitimate claim is offensive to society, precisely because the consumer pays for insurance to gain security and peace of mind.

Finally, we must evaluate the means judged necessary to deter future misconduct. Combined is a very large, wealthy insurance company which sends its agents out among the innocent citizenry, selling policies door-to-door. Its policyholders are not sophisticated commercial investors; they are ordinary citizens who hope to protect themselves from future calamities. If Combined is to be deterred from its past course of conduct, this can only be done through an assessment of punitive damages. In order to accomplish this purpose, the amount awarded must be sufficient to cause the defendant real concern. We cannot say that an assessment of .04% of the respondent's total assets is unwarranted under the circumstances of this case. The award does not shock our judicial conscience, and it is not clearly excessive.[2] Hale v. Riverboat Casino, Inc., 100 Nev. 299, 682 P.2d 190 (1984).

Other contentions have been considered and are deemed to be totally without merit. We therefore reinstate the jury's verdict. We reverse the grant of judgment notwithstanding the verdict, and affirm the denial of respondent's motion for a new trial.

/s/ Gunderson, C.J.
Gunderson

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[2] Appellant is not entitled to interest on the punitive damages award. *See* Ramada Inns v. Sharp, 101 Nev. 824, 711 P.2d 1 (1985). We understand that the policy benefits and compensatory damages have already been paid. Therefore, no interest is awarded by this decision.

We concur:

/s/ Steffen, J.
Steffen

/s/ Young, J.
Young

/s/ Springer, J.
Springer

/s/ Mowbray, J.
Mowbray

Attest: A full, true and Correct Copy
Judith Fountain, Clerk of the Supreme Court

By /s/ Sharon E. Page Deputy

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

No. 83-5569

Department No. 3

THOMAS AINSWORTH and EVELYN AINSWORTH,
Plaintiffs,

vs.

COMBINED INSURANCE COMPANY OF AMERICA, a foreign corporation; RONALD IOVINELLI; HERMAN BACA; *et al.*,
Defendants.

ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT NOT WITHSTANDING VERDICT

and

ORDER DENYING DEFENDANT'S MOTION FOR A NEW TRIAL ON THE ISSUE OF COMPENSATORY DAMAGES

Defendant's Motion for Judgment Notwithstanding The Verdict or In The Alternative For A New Trial was filed on March 28, 1986. Plaintiff's Opposition was filed on April 9, 1986, and Defendant replied to the Plaintiff's Opposition on April 15, 1986. Thereafter, the matter was submitted.

Pursuant to NRCP 50(b), Defendant moves for a judgment notwithstanding the verdict, requesting the Court for an order setting aside the verdict of punitive damages awarded in the above-captioned action.

. . .

Pursuant to NRCP 59(a), Defendant also moved for an order granting a new trial on the grounds that excessive compensatory and punitive damages had been awarded under the influence of passion and prejudice.

The jury in this case was called upon to decide several issues:

(1) It was for the jury to decide whether Plaintiff's injury was an accident not caused or contributed to by disease. Plaintiff had suffered a stroke while undergoing a medical procedure known as a angiogram. This procedure required the physical intrusion into the Plaintiff, Tom Ainsworth's, body of a catheter. Evidence was presented that the stroke resulted from disruption of atheromatous plaques during that procedure. Plaque forms on the inner walls of blood vessels in someone who has arteriosclerotic disease. When the plaque breaks off, it can form a blockage which results in a stroke. The jury found that the Plaintiff was entitled to benefits under the terms of the policy issued by the Defendant, which was an accident disability insurance policy.

(2) The jury was required to determine whether or not Defendant's refusal to pay benefits to the Plaintiff was in bad faith. The jury found the insurance company acted in bad faith when it refused to pay the benefits to which Plaintiff was entitled. The insurance company should have paid the Plaintiff $9,600.

(3) The jury was asked to determine the amount of damages, if any, to which the Plaintiff, Tom Ainsworth, was entitled for breach of the covenant of good faith and fair dealing. The jury was entitled to consider his emotional distress. The jury awarded the Plaintiff $200,000.

(4) The jury was asked to determine whether or not Evelyn Ainsworth was entitled to recover on her claim of fraud against the Defendant. The jury found in favor of the Defendant.

(5) The jury was instructed to determine the appropriateness of an award of punitive damages against the Defendant. The jury found that the Plaintiff, Tom Ainsworth, was entitled to punitive damages in the sum of $5,939,500.

The Defendant does not, at this time, challenge the jury's findings of coverage under the policy or of its own bad faith in refusing to pay the Plaintiff benefits due under the policy. Defendant challenges the award of punitive damages asserting that the verdict should be set aside as a matter of law. Defendant asserts that no substantial evidence exists to support the jury's finding of malice in fact. Defendant's motion can only succeed where there is no substantial evidence to support the verdict after all favorable inferences from the evidence are drawn in favor of the prevailing party. *Sanguinetti v. Strecker*, 94 Nev. 200 (1978).

Plaintiff argues that evidence of malice in fact exists in the claims file itself. The critical evidence in the claims file is as follows:

When Plaintiff, through his wife, submitted a claim based upon Plaintiff's stroke to the Defendant, Plaintiff's physician informed Defendant, through a statement included in the form, of the nature of Plaintiff's injury and how it was caused.

The claim was denied the day after it was received by Defendant. The Plaintiff was notified of the denial, which stated Defendant's position that the "loss was not due solely to accidental injuries, but was actually caused or contributed to by disease." The Defendant denied the claim without benefit of consultation with an independent physician or without reviewing the Plaintiff's medical records.

Upon transmitting the denial letter, Defendant also ordered Plaintiff's medical records from Washoe Medical Center.

After Defendant's second request for benefits, the Defendant requested Plaintiff's medical records from the Veterans Administration Hospital (where the injury occurred). Before those records were made available to Defendant, Defendant solicited the opinion of its medical consultant, Dr. Goldfinger. Dr. Goldfinger was asked by Defendant to "advise us as to our liability under the policies." Defendant represented to Dr. Goldfinger that the Plaintiff's policy provided benefits "for losses resulting solely from accidental injuries, providing such loss is not caused or contributed to by sickness or disease."

Dr. Goldfinger advised Defendant that the Plaintiff's injury "was contributed to by arteriosclerotic disease."

All the records of the VA Hospital were subsequently received except for the operative report, which was never forwarded. The VA Hospital records contained additional evidence of arteriosclerotic disease. After their receipt. Plaintiff's claim was again denied.

Plaintiff, through his wife, sent Defendant a third medical report and asked for reconsideration. This report informed Defendant that the angiogram showed Plaintiff's "cerebral arteries were completely normal at the time of his stroke."

Plaintiff's claim was denied a third time. Defendant indicated the reason for the denial was that the stroke was the "result of conditions . . . more properly classified as sickness. . . ."

The claim was also resubmitted to Dr. Goldfinger, with all the medical records in Defendant's possession. Dr. Goldfinger replied that the injury was not purely accidental.

A fourth request for reconsideration was sent to Defendant along with the report of Dr. Boradbent, who had performed the angiogram. Dr. Broadbent reiterated the view that the angiogram revealed no preexisting vascular disease. His report was not sent to Dr. Goldfinger.

Subsequently, the Defendant offered to compromise Plaintiff's claim for $1,940 (20 percent of the claim). Plaintiff again requested reconsideration for payment in full and Defendant again refused, but renewed its offer to pay 20 percent.

Plaintiff also points to the testimony of two witnesses called as experts by Plaintiff to support his argument that malice in fact existed in this case. David Moiola, an insurance broker, testified that he and any reasonable consumer would expect Plaintiff's injury to be covered.

Barbara Paull, an insurance claims adjuster, testified that in her opinion the way the claim was handled by the Defendant amounted to bad faith and reckless misconduct.

Defendant argues that Plaintiff has confused the issues of bad faith and malice. It is true that a breach of the covenant of good faith and fair dealing in and of itself does not give rise to the requisite finding of malice in fact which is necessary to sustain an award of punitive damages.

Based on the relationship which exists between an insurer and its insured, an insurer has the duty to act in good faith in the handling of its insured's claims. A cause of action exists against the insurer wherever this duty is breached. An unreasonable refusal to pay the insured for a valid claim subjects the insurance company to liability for all damages proximately resulting from such refusal and an insurer may breach the covenant of good faith and fair dealing when it fails to properly investigate its insured's claims.

> It does not follow that because plaintiff is entitled to compensatory damages that he is also entitled to exemplary damages. In order to justify an award of exemplary damages, the plaintiff must be guilty of oppression, fraud or malice. He must act with the intent to vex, injure or annoy,

> or with a conscious disregard of the plaintiff's rights. . . . *Silberg v. California Life Insurance Company*, 521 P.2d 1103 at 1110 (1974).

In *Silberg*, the Court stated further that a breach of the covenant of good faith and fair dealing did not necessarily establish that the Defendant acted with the requisite intent to injure the Plaintiff.

Based on the evidence admitted at trial, substantial evidence cannot be found to support a finding of malice in fact upon which the jury could have properly awarded punitive damages.

The jury could properly find, and did so, that the Defendant breached the covenant of good faith and fair dealing by the manner in which the Plaintiff's claim was handled and ultimately by the Defendant's refusal to pay benefits. However, the Defendant was in receipt of information from Plaintiff's own physician that plaque breaking away from Plaintiff's blood vessels during the angiogram caused the stroke. Defendant was further in receipt of information that plaque forms only in the presence of arteriosclerotic disease. Defendant's conduct cannot, under these circumstances, be characterized as malicious: a motive and willingness to vex, harrass, annoy or injure another person.

> A judgment notwithstanding the verdict is inappropriate where there is any substantial evidence to support the verdict, and the plaintiff must be given the benefit of every reasonable inference in support of the verdict. *Hernandez v. City of Salt Lake*, 100 Nev. 504 (1984).

Granting to the Plaintiff the benefit of every reasonable inference in support of the jury's verdict, the evidence exists to support a finding of bad faith, but not a finding of malice. The evidence does not, under any interpretation, demonstrate that the Defendant intended to do harm for

the mere satisfaction of doing it. Before punitive damages are appropriate, it must be concluded from the conduct being examined that an inference can be drawn that the Defendant acted with the requisite intent to injure the Plaintiff. Thus is the nature of malice in fact.

In *United Stated Fidelity v. Peterson*, 91 Nev. 617 (1975), the Nevada Supreme Court recognized the cause of action in tort for an insurer's breach of the implied covenant of good faith and fair dealing. But, in *Peterson*, the Supreme Court upheld the District Court's refusal to instruct the jury on punitive damages despite evidence in the record that the Defendant had been given notice by the Plaintiff of several valid claims and that Defendant had knowledge of the effect its refusal to pay would have on the Plaintiff. The Defendant knew the Plaintiff was due the money and yet refused to pay. The Court cited *Silberg* as well as several Nevada cases in support of its conclusion. Those Nevada cases, in addition to *Silberg*, are instructive here.

In *Village Development Company v. Felice*, 90 Nev. 314 (1974), the Court stated:

> The record contains evidence to show negligence and unconscionable irresponsibility. Still after careful consideration and extensive debate, we find insufficient evidence to support a finding of oppression, fraud or malice, express or implied .... We have heretofore sustained awards of punitive damages where evidence showed the wrong was willful, and damage either intended or a necessary consequence. Here, however, the evidence does not to us appear quite sufficient to meet our previously-established requirement that more must be shown than malice in law, and that there must be substantial evidence of malice in fact.

The proposition of law stated in *Felice* continues to have vitality today. In Nevada, malice in fact must be shown in order to sustain a verdict for punitive damages.

> An award of exemplary damages, in an action for damages for injuries inflicted by the defendant's malicious act, can be made only if the plaintiff can show that malice in fact, as distinguished from malice in law, existed with respect to the defendant's act. The distinction between malice in fact and malice in law is substantial. Malice in fact, or actual malice, denotes ill will on the part of the defendant, or his desire to do harm for the mere satisfaction of doing it. Malice in law, on the other hand, is merely a legal fiction: it is that form of malice which the law presumes, either conclusively or disputably, to exist on the production of certain designated evidence. Malice in fact cannot be presumed; its existence must be found as a matter of fact by the jury, although it may be proved either by direct evidence or declaration, or by an inference drawn from the actual conduct of the defendant. While the element of malice which is essential to a recovery of exemplary, or punitive, damages is sometimes called "express malice", or "actual malice", "real malice", or "true malice", it is always, in the last analysis, malice of only one kind—the malice of evil motive. . . . Malice in fact, sufficient to support an award of damages within the scope of NRS 42.010 may be established by a showing that the appellant's wrongful conduct was willful, intentional and done in reckless disregard of its possible results. *Nevada Credit Rating Bureau, Inc. v. Williams*, 88 Nev. 601 at 609 and 610 (1972).

No reasonable inference from the evidence here can be made that Defendant acted with ill will or desire to do harm for the mere satisfaction of doing it. Nor does the evidence support a finding that the Defendant consciously

and deliberately disregarded the Plaintiff's rights in reckless disregard of the possible results. *Jeep Corporation v. Murray*, 101 Nev. Adv. Op. 130 (1985). In fact, it is undisputed that Defendant had no knowledge of Plaintiff's financial circumstances or was in any manner apprised of how its conduct affected the Plaintiff financially or otherwise. This fact becomes significant when the facts of those cases cited to the Court on the issue of punitive damages are analyzed. In virtually every case where an award of punitive damages was sustained, Defendants had knowledge of the wrongful nature of their conduct and knowledge of the resulting harm.

In Defendant's Motion for a New Trial, it is unnecessary to decide whether Defendant is entitled to a new trial on the issue of punitive damages. As a matter of law, Plaintiff is not entitled to punitive damages.

Defendant requests a new trial on the issue of compensatory damages and argues that the damages were awarded under the influence of passion and prejudice. The jury awarded Plaintiff, Tom Ainsworth, $200,000 for emotional distress and benefits that should have been paid under the policy.

> It can hardly be denied that, because of their very nature, a determination of their monetary compensation falls peculiarly within the province of the jury . . . . We may not invade the province of the fact finder by arbitrarily substituting a monetary judgment in a specific sum felt to be more suitable. *Stackiewicz v. Nissan Motor Company*, 100 Nev. 443 (1984).

As conceded by counsel for the Plaintiff, the verdict is substantial, but under the circumstances of this case, it cannot be said that the award is so excessive as to suggest the intrusion of passion and prejudice upon the deliberations of the jury.

For all the reasons enumerated,

NOW, THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion for Judgment Notwithstanding the Verdict is granted and that Defendant's Motion for a New Trial on the Issue of Compensatory Damages is denied.

DATED this 28 day of August, 1986.

/s/ Demnborah A.
Agosti
DISTRICT JUDGE

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

Case No. 83-5569

Dept. No. 3

THOMAS AINSWORTH,

Plaintiff,

v.

COMBINED INSURANCE COMPANY OF AMERICA,

Defendant.

JUDGMENT

The cause of Thomas Ainsworth, plaintiff, versus Combined Insurance Company of America, defendant having come before the Court for jury trial on March 17, 1986;

And a duly impaneled jury having heard the evidence, having been instructed on the law, and having rendered its verdict on the issue of punitive damages in favor of plaintiff Thomas Ainsworth, and against defendant Combined Insurance Company of America, and having assessed said punitive damages in the amount of Five Million Nine Hundred Thirty-Nine Thousand Five Hundred Dollars ($5,939,500.00);

And the Supreme Court of Nevada having Ordered said jury verdict reinstated, in its decision filed October 26, 1988, and published in the case of *Ainsworth v. Combined Insurance Company of America*, 104 Nev. ___, 763 P.2d 673 (1988), of which this Court takes judicial notice;

And the Supreme Court of Nevada having Ordered denied all petitions for rehearing in the matter, and the

Court's published opinion filed May 19, 1989, in the case of *Ainsworth v. Combined Insurance Company of America*, 105 Nev. Advance Opinion 53, ___ P.2d ___, (May 19, 1989), of which this Court takes judicial notice;

And the Clerk of the Supreme Court of Nevada having issued Remittitur pursuant to Rule 41(a),N.R.A.P. and the decision of the Nevada Supreme Court, receipt of which was obtained by the Clerk of this Court this date, and jurisdiction thereby having been returned to this Court;

NOW, THEREFORE, as provided in Rule 58, Nevada Rules of Civil Procedure, judgment is hereby rendered in favor of Thomas Ainsworth and against Combined Insurance Company of America, in the sum of Five Million Nine Hundred Thirty-Nine Thousand Five Hundred Dollars ($5,939,500.00).

Dated this 23rd day of May, 1989.

/s/ Deborah A. Agosti
DISTRICT JUDGE

SUPREME COURT OF THE UNITED STATES

No. A-984

COMBINED INSURANCE COMPANY OF AMERICA,
Applicant

v.

THOMAS AINSWORTH

ORDER

UPON CONSIDERATION of the application of counsel for the applicant and the response filed thereto,

IT IS ORDERED that execution and enforcement of the judgment of the Supreme Court of Nevada, case No. 17625, filed in the Second Judicial District Court of Nevada, County of Washoe, No. 83-5569, Dept. No. 3, on May 30, 1989, be, and the same is hereby, stayed pending the timely filing and disposition by this Court of a petition for a writ of certiorari. If the petition for a writ of certiorari is denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this order shall remain in effect pending the issuance of the mandate of this Court.

This stay is further conditioned upon the posting of a good and sufficient bond with the Clerk of the Supreme Court of Nevada to be approved by that Court.

/s/ Sandra Day O'Connor
Associate Justice of the Supreme
Court of the United States

Dated this 15th day of June, 1989.

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 17625

THOMAS AINSWORTH,

Appellant,

vs.

COMBINED INSURANCE COMPANY OF AMERICA,

Respondent.

FILED
JUN 23 1989

CLERK OF SUPREME COURT
By /s/ J. Richards
CHIEF DEPUTY CLERK

ORDER APPROVING BOND

Pursuant to our order of June 22, 1989, Combined Insurance Company of America has submitted to the clerk of this court a supersedeas bond in the amount of $8,000,000. The bond complies in all respects with our previous order. We therefore approve the bond and direct the clerk of this court to file the bond, forthwith. Further, the clerk of this court shall return to counsel for Combined the original $7,000,000 supersedeas bond previously submitted by Combined.

It is so ORDERED.

/s/ Young, C. J.

/s/ Springer, J.

/s/ Steffen, J.

cc: Peter Chase Neumann
Bradley & Drendel
Mortimer Sourwine Mousel Sloane & Knobel
Lionel Sawyer & Collins
Laura FitzSimmons
Geoffrey Cornell Hazard, Jr.

CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

DATE: June 26, 1989
Supreme Court Clerk,
State of Nevada
By Sharon E. Page Deputy

APPENDIX B—PART 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 17625

THOMAS AINSWORTH,

Appellant,

vs.

COMBINED INSURANCE COMPANY OF AMERICA,

Respondent.

RESPONDENT'S ANSWERING BRIEF

* * *

I. ISSUES PRESENTED FOR REVIEW.

* * *

4. Punitive damages impose a quasi-criminal exaction on the defendant, and they are a windfall to the plaintiff. Should Nevada join Arizona, Indiana, Maine, New York, the Virgin Islands, the District of Columbia, and the American Bar Association Action Commission to Improve the Tort Liability System and require their proof to be by clear and convincing evidence?

* * *

6. Would reversal of the lower court's judgment n.o.v. and reinstatement of the jury's disproportionate punitive verdict, rendered on insufficient evidence and unconstitutionally vague instructions, result in a denial of Combined Insurance Company of America's rights to Due Process of Law and the imposition of an Excessive Fine, in derogation of the Eighth and Fourteenth Amendments to the United States Constitution?

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 17625

THOMAS AINSWORTH,

Appellant,

vs.

COMBINED INSURANCE COMPANY OF AMERICA,

Respondent.

RESPONDENT'S ANSWERING BRIEF

* * *

On March 9, 1987, the United States Supreme Court granted review in *Bankers Life & Casualty Co. v. Crenshaw*, 483 So.2d 254 (Miss. 1985), *reviewed granted*, ___ U.S. ___ (1987) (Case No. 85-1765), the case on which Ainsworth principally relies to sustain his appeal. The grant of review in *Bankers Life* confirms that punitive damages and the lack of clear standards to govern their award pose serious constitutional questions. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va.L.Rev. 269 (1982) [hereinafter, "Wheeler, *The Constitutional Case for Reform*"]; *see also Aetna Life Insurance Co. v. LaVoie*, ___ U.S. ___, 106 S.Ct. 1580, 1589 (1986). While a heightened concern with fairness to the defendant is appropriate in the punitive damages setting, that concern is not counterbalanced by any claim of right in the plaintiff. On the contrary, "a plaintiff is never entitled to punitive damages as a matter of right." *Nevada Cement Co. v. Lemler*, 89 Nev. 447, 451, 514 P.2d 1180, 1182 (1973); *Allen v. Anderson*, 93 Nev. 204, 562 P.2d 487 (1977). This disparity between the plaintiff's and defendant's interests has led a number of commentators

and, recently, some courts to conclude that nothing less than "clear and convincing" evidence will sustain punitive damages or, in the alternative, that there should be greater and more active judicial review of punitive damage awards. Wheeler, *The Constitutional Case for Reform*, 69 Va.L.Rev. at 293-303; Note, *Criminal Safeguards and The Punitive Damages Defendant*, 34 U.Chi.L.Rev. 408, 417-18, 424-26 & 429 (1967); Note, *Exemplary Damages in the Law of Torts*, 70 Harv.L.Rev. 517, 530 (1957).

Proof by clear and convincing evidence of the elements needed to sustain a punitive damages award should be the standard in Nevada. Whether it is or not, this Court should accord the district court deference in the careful post-trial review it undertook of the punitive damages verdict in this case. The exacting review this Court gives and, by its example, has enjoined trial courts to give the issue of punitive damages is evident in its reported cases. *See, e.g., Village Development Co. v. Filice*, 90 Nev. at 315, 526 P.2d at 89 ("after careful consideration and extensive debate, we find insufficient evidence to support a finding 'oppression, malice or fraud, express or implied' ").[11] The district court has an advantage in this task, since it enjoys a "first-hand knowledge of witnesses, testimony, and issues . . . , [a] 'feel' for the overall case." *Neely*, 386 U.S. at 325.

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[11] *See also* cases discussed at note 10, *supra*. It is arguable that *Village Development Co.* and its progeny anticipate the "clear and convincing standard" increasingly being advocated by the commentators and adopted by other courts. In *Travelers Indemnity Co. v. Armstrong*, 442 N.E.2d 349, 358-60 (Ind. 1982), for example, the court adopted a "clear and convincing" standard to govern punitive damages cases and, in so doing, suggested that the standard was anticipated in some of its earlier decisions, where a more rigorous review of the evidence was given than a mere preponderance standard would mandate or approve; *see also Wagnen v. Ford Motor Co.*, 294 N.W.2d 437, 461 (Wis. 1981) (advocating *de novo* review of punitive damage verdicts). Both *Travelers Indemnity* and *Armstrong* are discussed *infra* at 45-49.

A trial court's determination that the record does not contain substantial evidence of malice deserves a deference not otherwise found in the Rule 41(b)/Rule 50 setting. In *Jeffers v. Bob Kaufman Machinery*, 101 Nev. 684, 707 P.2d 1153 (1985), for example, this Court was confronted with a trial court order withdrawing the question of punitive damages from the jury. After reviewing the record, the Court affirmed. It said:

> Finally, the district court did not err in withdrawing the issue of punitive damages from the jury. In considering this question, we give deference to the district court's weighing of the evidence. In reviewing the record, we believe that the district court could have reasonably concluded that evidence of malice in fact had not been presented by the parties.

Id. at 686-87, 707 P.2d at 1154 (citations omitted).[12]

The district judge who presided over this case expressed grave reservations before acceding to Ainsworth's request that the jury be instructed on punitive damages. RT-VI-208 & 215-216, App. at 4. The legal issues were clouded and apparantly briefed only hastily by Ainsworth and not at all by Combined. RT-VI-189; RA 74-119. The declared purpose of Rule 50(b) is to permit the trial judge to rectify errors that crept into the trial because "during the [heat of] trial of the original case the trial judge does not have

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[12] *See Warmbrodt*, 100 Nev. at 709, 692 P.2d at 1286 (upholding the lower court's refusal to instruct on punitive damages on the basis that "[i]t was *permissible* for the trial court to conclude that . . . [substantial] evidence [of malice in fact] had not been received in this case"); *Bader*, 96 Nev. at 359, 609 P.2d at 318-19 (to like effect); *see also Wickliffe v. Fletcher Jones of Las Vegas*, 99 Nev. 353, 356, 661 P.2d 1295, 1297 (1983) ("[i]t is the responsibility of the trial court to determine whether, as a matter of law, the plaintiff has offered substantial evidence of malice in fact to support a punitive damage instruction"); *Leslie*, 92 Nev. at 393-94, 551 P.2d at 235.

time . . . to review some of the questions of law that may arise." *Ortiz v. Greyhound Corp.*, 192 F.Supp. 903, 905 (D.Md.1959), *aff'd*, 275 F.2d 770 (4th Cir. 1960) (addressing the cognate provision in the Federal Rules to Nev.R.Civ.P. 50(b)); *Brown v. Alkire*, 295 F.2d 411, 414 (10th Cir. 1961). Ainsworth asserts that, having given the instruction, the lower court was precluded from granting judgment n.o.v. or, alternatively, that this procedural history somehow impugns the soundness of its decision to do so. Cases to have considered similar questions have reached precisely the opposite conclusion. *Ortiz*, 192 F.Supp. at 905; *Sarkisian v. The Newpaper, Inc.*, 512 A.2d 831 (R.I. 1986). Indeed, the intellectual honesty and the meticulous distinctions correctly set forth in the lower court's order deserve to be commended, not condemned.[13]

* * *

The principal authority on which Ainsworth relies to sustain his appeal is *Bankers Life & Casualty Co. v. Crenshaw*, 483 So.2d 254 (Miss. 1985). On March 9, 1987, the United States Supreme Court granted review in that case to consider, in addition to another unrelated question, the following issue:

> Does a $1.6 million punitive damage award against insurance company on insurance claim of $20,000 violate Excessive Fines Clause, or is award otherwise invalid under Contract and Due Process Clauses because award is grossly dispro-

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[13] The case of *Parks v. Phillips*, 71 Nev. 314, 289 P.2d 1053 (1955) is analogous. That case involved cross-appeals from an order denying a new trial on compensatory damages but granting it on punitive damages. This Court answered the argument that the lower court misunderstood the facts or the law by emphasizing that, like the jury, the trial judge heard and saw the witnesses. That the trial judge "was alert to the entire situation [was] evident from the fact that he granted a new trial on the issue of punitive damages [but denied it on the compensatory damage claims]." *Id.* at 318, 289 P.2d at 1055.

portionate to actual damages and vastly greater than any penalties prescribed by Mississippi legislature for similar or analogous improper business activities, or because award was imposed under standard of conduct newly formulated by court and applied retrospectively to conduct that occurred almost seven years before standard was announced?

* * *

C. The Evidence In This Case Should Be Judged By A "Clear And Convincing" Standard.

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is "to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 370 (1970).

> The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision. . . .
>
> At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.
>
> In a criminal case, on the other hand, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice,

> our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt.
>
> The intermediate standard, which usually employs some combination of the words "clear," "cogent," "unequivocal," and "convincing," is less commonly used, but nonetheless is no stranger to the civil law. One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. . . . Similarly, this Court has used the "clear, unequivocal and convincing" standard of proof to protect particularly important individual interests in various civil cases.

Addington v. Texas, 441 U.S. 418, 423-24 (1979) (citations omitted); *see Santosky v. Kramer*, 455 U.S. 745, 454-55 (1982). This Court has recognized these principles and applied them to require clear and convincing proof in a number of settings.[21]

A plaintiff is not entitled to punitive damages as a matter of right. *Gidney v. Merrian*, 98 Nev. 54, 639 P.2d 536 (1982); *Allen v. Anderson*, 93 Nev. 204, 562 P.2d 487 (1977). Punitive damages are unique in the civil law in that they are not awarded to compensate the plaintiff. On

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[21] *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985) (proof of prior bad acts); *Champagne v. Welfare Division*, 100 Nev. 640, 691 P.2d 849 (1984) (termination of parental rights); *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983) (proof needed to overcome the presumption that property acquired during marriage is community); *Nevada Independent Broadcasting Corp. v. Allen*, 99 Nev. 404, 664 P.2d 337 (1983) (jury's finding of actual malice in defamation action involving media defendant and public figure) *Jacobson v. Best Brands*, 97 Nev. 390, 632 P.2d 1150 (1981) (parol evidence offered to defeat a written instrument); *Lubbe v. Barba*, 91 Nev. 596, 540 P.2d 115 (1975) (fraud); *McIntosh v. State*, 86 Nev. 133, 466 P.2d 656 (1970) (voluntariness of a confession).

the contrary, "[t]he concept of punitive damages rests on a presumed public policy, to punish the wrongdoer for his act." *Miller v. Schnitzer*, 78 Nev. 301, 311, 371 P.2d 824, 829 (1962). There is a stigma that attaches to an award of punitive damages, similar to that associated with fraud. *See* Wheeler, *The Constitutional Case for Reform*, 69 U.Va.L.Rev. at 283; *see* Grass, *The Penal Dimensions of Punitive Damages*, 12 Hast. Const. L.Q. 240, 251 (1985). These factors, coupled with concern for fundamental fairness in this largely standardless area, have led other courts to require clear and convincing proof for punitive damages:

> There is no right to punitive damages. We have repeatedly said that such damages may be awarded in an appropriate case, as a punishment for the offense and to deter similar misconduct. It has never been implied that a plaintiff has any entitlement to such damages. Rather, he is merely the fortunate recipient of the "windfall." It cannot be said, therefore, that a plaintiff seeking such a bonus is denied any right, if he be held to a degree of proof higher than is required in other actions. In fact, it is incongruous to permit a recovery of that to which there is no entitlement upon evidence that barely warrants a recovery of that which is the plaintiff's absolute right. Yet, that is precisely what may occur when the inference of obduracy, from which punitive damages may flow, is permissible, but not compelled, from the same conduct from which compensatory damages flow, as a matter of right. To avoid such occurrences, punitive damages should not be allowable upon evidence that is merely consistent with the hypothesis of malice, fraud, gross negligence or oppressiveness. Rather some evidence should be required that is inconsistent with the hypothesis that the tortious conduct was the result of a mistake of law or fact,

honest error of judgment, over-zealousness, mere negligence or other such noniniquitous human failing. For, just as we agree that it is better to acquit a person guilty of crime than to convict an innocent one, we cannot deny that, given that the injured party has been fully compensated, it is better to exonerate a wrongdoer from punitive damages, even though his wrong be gross or wicked, than to award them at the expense of one whose error was one that society can tolerate and who has already compensated the victim of his error. The public interest cannot be served by a policy that favors the latter over the former. And, just as the requirement of proof beyond a reasonable doubt furthers the public interest with respect to criminal cases, a requirement of proof by clear and convincing evidence furthers the public interest when punitive damages are sought.

* * *

A rule that would permit an award of punitive damages upon inferences permissibly drawn from evidence of no greater persuasive value than that required to uphold a finding of the breach of contract which may be nothing more than a refusal to pay the amount demanded and subsequently found to be owing injects such risk into refusing and defending against questionable [insurance] claims as to render them, in essence, nondisputable. The public interest cannot be served by any policy that deters resort to the courts for the determination of bona fide commercial disputes. . . . The insurer is permitted to dispute its liability in good faith because of the prohibitive social costs of a rule which would make claims nondisputable.

Travelers Indemnity Co. v. Anderson, 442 N.E.2d 349, 362-63 (Ind. 1982) (citations omitted; emphasis added).[22] *Accord, Linthicum v. Nationwide Life Insurance Co.*, 723 P.2d 675, 680-81 (Ariz. 1986); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 850-51 (2d Cir. 1967); *Acosta v. Honda Motor Co.*, 717 F.2d 828, 839 (3rd Cir. 1983); *Raynor v. Richardson-Merrell, Inc.*, 643 F.Supp. 238, 245 (D.D.C. 1986); *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437 (Wis. 1980). The adoption of this standard of proof is also specifically recommended by the ABA's Action Commission to Improve the Tort Liability System. *See* Recommendation No. 5(b), Report of the ABA Action Commission to Improve the Tort Liability System, released January 12, 1987.[23]

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[22] Combined adequately preserved this issue with its objection that the evidence did not support giving an instruction on punitive damages, which instruction included the erroneous statement that punitive damages could be assessed on a showing of malice or oppression by a mere preponderance of the evidence. RA 147, App. at 15; RT-VI-215-16, App. at 4. This was in the holding in *Linthicum, supra*, for example, where the Arizona Supreme Court adopted "clear and convincing" as the standard for assessing punitive damages even though there the insurer objected only to the giving of an instruction on punitive damages, not to the failure of the court to instruct a higher burden of proof. *See also Farm Bureau Mutual Insurance Co. v. Dercach*, 450 N.E.2d 537 (Ct.App.Ind. 1983) (the decision in *Travelers*, noted in the text, would be applied retroactively even in the absence of *any* objection in the Court below, given the quasi-criminal nature of punitive damages and the constitutional underpinnings of the *Travelers* decision). As the respondent who prevailed in the Court below, Combined is entitled to raise this issue in any event, since it supports the lower court's judgment, which Combined is asking this Court to uphold. *See, e.g., Colautti v. Franklin*, 439 U.S. 379, 396 n.16 (1979).

[23] *See also* Wheeler, *The Constitutional Case for Reform*, 69 U.Va.L.Rev. at 296-99; Note, *Criminal Safeguards*, 34 U.Chi.L.Rev. at 417-18. The result reached in these cases has been legislatively mandated in Oregon and Minnesota. Or.Rev.Stat. § 30.925 (1981); Minn.Stat.Ann. § 549.20 (W.Supp. 1983); *see also* Colo.Rev.Stat. § 13-

E. The Lower Court's Decision Was Constitutionally Correct; To Reinstate The Jury's Verdict Would Work A Violation Of Combined's Eighth And Fourteenth Amendment Rights.

Combined challenged the jury's punitive damages verdict on the grounds that it was both excessive and rendered on insufficient evidence of malice. RA 173-187, App. at 6; RA 312-336, App. at 8. The Court adopted the latter as the basis for its decision and did not address the former. The jury's award of $5,939,500 is 618 times greater than the $9,600 insurance claim Combined ultimately paid. Had Combined been charged with and found guilty of violating Nevada's unfair claims practices statute in this case, it could not have been assessed more than $1,000. NRS 686A.310; NRS 686A.183(1)(a). The punitive damage award the jury returned is 5,939 times greater than the maximum punishment the Nevada legislature has prescribed for business misconduct of the type allegedly involved here! No comparable assessment has ever been presented to or sustained by this Court; nor are there reports of any such assessment at the district court level.

The Excessive Fines Clause of the Eighth Amendment to the United States Constitution provides:

> Nor [shall] excessive fines [be] imposed.

This Court has acknowledged "the subjective nature of punitive damages and the absence of workable standards by which to evaluate the propriety of such an award." *Bull v. McCuskey*, 96 Nev. 706, 711, 615 P.2d 957, 961 (1980). Indeed, this absence of workable standards has been given as a reason for reposing discretion in the jury as to the amount of punitive damages to award. *Id.* A fine imposed by a jury subject to no standards in its deliberation and which is 5,939 times greater than the fine for

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25-27 (1973) (requiring proof beyond a reasonable doubt in punitive damage cases).

the closest analog statutory offense is without doubt excessive under the Eighth Amendment. *Solem v. Helm*, 463 U.S. 277 (1983). To reinstate the jury verdict in this case would also violate Combined's rights to Due Process of Law. *See* Wheeler, *The Constitutional Case for Reform*, 69 Va.L.Rev. at 270-72.

The only offense of which Combined was found "guilty" by the jury was the offense of failing to pay an insurance claim based on its determination, supported by two opinions from its medical consultant, that Ainsworth's injuries were not covered because they were caused or contributed to by disease. For reasons known only to the jury, a confiscatory penalty was imposed on Combined after Ainsworth had been made whole in damages. This punishment bears no rational relationship to the alleged harm (*Solem*, 463 U.S. at 290-91), to the punishment prescribed by the Nevada legislature for analogous conduct (*id.* at 293-95, 298-99), or to verdicts this Court and the lower courts of this State have permitted against other insurers for misconduct more aggravated than that alleged to exist here (*see Peterson, supra; American Excess, supra; Fiscus, supra*).

These are important constitutional questions. *Aetna Life Insurance Co. v. LaVoie*, ___ U.S. ___, 106 S.Ct. 1580, 1589 (1986); *Bankers Life & Casualty Co. v. Crenshaw, review granted*, ___ U.S. ___ (Case No. 85-1765; March 9, 1987). The challenge Combined made in the lower court to the verdict's excessiveness and to the jury's standardless and impassioned decision-making should, by analogy to this Court's decision in *Swartz v. Adams*, 93 Nev. 240, 563 P.2d 74 (1977), adequately preserve the question for review, even if Combined were the appellant rather than the respondent.[25] As the party who prevailed in the court

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[25] While a number of commentators had urged a contrary rule, it was not until the Supreme Court's April 22, 1986 decision in *Aetna v.*

below, Combined is in any event entitled to "assert any ground in support of the lower court's judgment, whether or not that ground was relied on or even considered by the trial court." *Colautti v. Franklin*, 439 U.S. at 396 n.16. The jury's verdict in this case cannot, consistent with the Excessive Fines Clause of the Eighth Amendment and Due Process, be reinstated.

F. If There Are To Be Further Proceedings In This Case Remand Or Remittitur, Not Reversal, Are In Order.

The jury received no guidance on the amount of damages to assess, RA 147, App. at 15; it only heard counsel's impassioned argument that damages should be assessed as a percentage of Combined's net worth. RA 270-272. Reprehensibility is a question of degree. *Kellar v. Brown*, 101 Nev. 773, 701 P.2d 359 (1985); *Nevada Cement Co. v. Lemler*, 89 Nev. 447, 514 P.2d 1180 (1973). The punishment the jury would have this Court impose does not fit the crime, *Paullin v. Sutton, supra*; it is such, truly, as to "shock the conscience." *Caple v. Rayner Campers, Inc.*, 90 Nev. at 345, 526 P.2d at 337; *see Gidney v. Merrian, supra*. Nev. 54, 639 P.2d 536 (1982).

"The party in whose favor [a] motion for judgment [nov] was granted may assert on appeal that the denial of the alternative motion [for new trial] was error, and need not

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LaVoie that Eighth or Fourteenth Amendment challenges to punitive damage awards were regarded as legitimate. *See* Grass, *The Penal Dimensions of Punitive Damages*, 12 Hast.Const.L.Q. 240, 242 (1985). Constitutional challenges to punitive damages are not entertained until after verdict and trial. *Id.* at 243. The briefing on Combined's post-trial briefs was completed on April 15, 1986. This intervening change in the law, coupled with the overall importance of the question, are additional reasons this Court should consider the constitutional underpinnings for the lower court's decision in this case. *Cf. See Farm Bureau Mutual Insurance Co.*, 450 N.E.2d at 541; *see also Arnold v. Knettle*, 460 P.2d 45 (Ct.App.Ariz. 1969); *Anaya v. Industrial Commission*, 512 P.2d 625 (Colo. 1973).

take a cross-appeal to do so." 9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2539 at 611 (1971) (footnotes omitted). The issues of the excessiveness of the jury's punitive damage award and whether a new trial should be granted on that basis should be decided in the first instance by the trial court, who heard and saw the witnesses and has a "feel" for the overall case. *See Neely v. Martin K. Eby Construction Co.*, 386 U.S. 298 (1967). The trial court's decision to grant judgment n.o.v. in this case was correct and should be affirmed. If there are to be further proceedings, however, the case should be remanded to the district court for decision on Combined's alternative motion for a new trial on the issue of punitive damages. Alternatively, this Court should exercise its inherent authority and order a remittitur. *Cartier v. Liberty Laundry, Inc.*, 139 A.473 (R.I. 1927), *cited with approval in Harris v. Zee*, 87 Nev. 309, 313, 486 P.2d 490, ___ (1971) (per Mowbray, J., dissenting).

V. CONCLUSION

This appeal confirms the wisdom of NRCP 50(b). The Ainsworths have been fully compensated under their policies and for the manner in which Combined handled Mr. Ainsworth's claim. To reinstate the $5.9 million verdict for punitive damages would provide an enormous windfall to the Ainsworths and be profoundly unjust to Combined. This insurer did not act with malice or evil motive toward the Ainsworths. It is a tribute to the advocacy of plaintiffs' counsel and to the known antipathy of juries to insurance companies that an award of punitive damages was returned. The judge recognized this and the significance of the matters discussed in this brief when, after considering the facts as she saw and heard them, she decided that her initial reluctance to submit punitive damages to the jury was well founded. The record and the law support her decision to render judgment for Combined on punitive damages. Neither the facts nor the law support punishing

Combined by giving plaintiffs, in addition to full compensation, 618 times the full amount of the policies in issue here.

This appeal should affirm Judge Agosti's eminently correct decision. To do otherwise would be a rebuke not supported by the record or the law. Reinstatement of the punitive damage award would also raise substantial constitutional questions now foreshadowed by *Bankers Life & Casualty Co. v. Crenshaw*, 483 So.2d 254 (Miss. 1985), *review granted*, ___ U.S. ___ (March 9, 1987) (Case No. 85-1765). These results can be avoided and justice done to all parties to this appeal by affirming the judgment n.o.v. for Combined Insurance Company of America.

Dated this 20th day of March, 1987

STEVE MORRIS
M. KRISTINA PICKERING
LIONEL SAWYER & COLLINS

By /s/ M. Kristina Pickering
M. Kristina Pickering
1700 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101

DOUGLAS A. SLOANE
MORTIMER SOURWINE MOUSEL
SLOANE & KNOBEL
333 Marsh Avenue
P.O. Box 460
Reno, Nevada 89504

Attorneys for Respondent

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 17625

THOMAS AINSWORTH,

Appellant,

vs.

COMBINED INSURANCE COMPANY OF AMERICA,

Respondent.

APPELLANT AINSWORTH'S REPLY BRIEF

* * *

C. PUNITIVE DAMAGES ARE NOT UNCONSTITUTIONAL

Although CICA elected not to file a cross-appeal it, again, attempts to raise issues for the first time in its Answering Brief. Appellant Ainsworth contends these issues are outside the scope of appeal. *See*, SIERRA CREEK RANCH v. J.I.CASE, 97 Nev. 457,460, 634 P.2d 458 (1981); HOLLAND LIVESTOCK v. B & C ENTERPRISES, 92 Nev. 473,474, 553 P.2d 950 (1976).

CICA argues that reinstatement of the jury's verdict would violate its rights under the Eighth and Fourteenth Amendent to the U.S. Constitution. CICA takes comfort in the Supreme Court's grant of review in BANKERS LIFE & CASUALTY CO. v. CRENSHAW, 483 So.2d 254, ___ U.S. ___ (Case No. 85-1765) (March 9, 1987). Respondent fails to cite a single case in which any court of law sustained the argument that an assessment of punitive damages violated the defendant's Eighth or Fourteenth Amendment rights. See HOLLAND LIVESTOCK v. B. & C. ENTERPRISES, 92 Nev. 473-4, 553 P.2d (1976).

Further, Combined ignores numerous cases which reject constitutional attacks upon punitive damages. More than one hundred years ago, the United States Supreme Court held that:

> "It is a well-established principle of the common law, that in actions . . . for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff."

DAY v. WOODWORTH, 54 U.S. 363, 371 (1851) (recognizing in 1851 that the doctrine was "more than a century" old.

The Court cited DAY v. WOODWORTH, in CURTIS PUBLISHING CO. v. BUTTS, 388 U.S. 130, 159 (1966), for the proposition "that the Constitution presents no general bar to the assessment of punitive damages in a civil case." The Court in BUTTS went on to specifically reject the petitioner's constitutional attack on the award of punitive damages, saying, "there is. . .nothing in any of our past cases which suggests that compensatory and punitive damages are subject to different constitutional standards of misconduct." *Id.* at 160.

Punitive damages have become a vital and successful means of regulating and reforming undesirable conduct. The punitive damages award has acquired the "characteristics of a strong, silent, consumer public advocate. . . This essential and crucial body of common law, marked by relative simplicity, is playing an increasingly significant role in protecting contemporary society from many nonregulated or inadequately regulated business and industries." Levine, *Demonstrating and Preserving The Deterrant Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 U.S.F.L. REV. 613, 615 (1979).

In TOOLE v. RICHARDSON-MERRELL, INC., 60 Cal. Rptr. 398,417, (Cal. App. 1967), the defendant contended

that the imposition of an award of punitive damages violated its constitutional rights because it was not afforded the safeguards required in criminal prosecutions. The Court first noted that the defendant, like Combined, "cites no case in support of its contentions, and we find none in its favor." *Id.* at 418. After determining that the action was "purely civil", the Court said: "It follows that the award of penal damages made under civil rules of procedure did not violate any constitutional right of appellant." *Id.*

TOOLE has twice been cited with approval by this Court. NEVADA CEMENT CO. v. LEMLER, 89 Nev. 447, 452, 514 P.2d 1180 (1973); NEVADA CREDIT RATING BUR. v. WILLIAMS, 88 Nev. 601, 610, 503 P.2d 9 (1972). *And see*: DOWNEY SAVINGS & LOAN ASS'N v. OHIO CASUALTY INSURANCE CO., 234 Cal.Rptr. 835,852, (Feb. 26, 1987), wherein the California Court of Appeals affirmed TOOLE:

> "Ohio claims the punitive damage award violates the Eighth Amendment's prohibition against the imposition of excessive fines. We have already concluded the ($5,000,000) award is not excessive as a matter of law. Moreover, the Eighth Amendment applies only to criminal actions, not to purely civil penalties, as involved here. (INGRAHAM v. WRIGHT (1977) 430 U.S. 651, 664, 97 S.Ct. 1401, 1498, 51 L.Ed.2d 711; ZWICK v. FREEMAN (2d Cir.1967) 373 F.2d 110, 119.) Ohio also contends the punitive damage award was imposed in a civil action " 'unaccompanied by the types of safeguards present in criminal proceedings,' " in violation of the Fourteenth Amendment due process clause. Where, as here, the action is civil in nature, civil rules rather than criminal rules of procedure apply. (TOOLE v. RICHARDSON-MERRELL INC. (1967) 251 Cal.App.2d 689, 717, 60 Cal.Rptr.398.) Besides, Ohio has failed to identify the "safe-

> guards" it was allegedly denied. We conclude the award of penal damages made under civil rules of procedure did not violate any of Ohio's constitutional rights. (TOOLE v. RICHARDSON-MERRELL INC., supra, at p. 717, 60 Cal.Rptr. 398.) The judgment is affirmed as to Ohio's appeal . . ."

In STURM, RUGER & CO., INC. v. DAY, 594 P.2d 38, 46 (Alaska 1979), the Supreme Court of Alaska rejected the argument that an award of punitive damages violated the Due Process Clause because the jury has no standards by which to determine the extent of a defendant's culpability and the amount of damages to be assessed. Courts rebuffed similar attacks in EGAN v. MUTUAL OF OMAHA INS. CO., 133 Cal. Rptr. 899, 914-915 (Cal. App. 1976)(see also cases cited therein); KINK v. COMBS, 135 N.W.2d 789, 797 (1965); and VOLLERT v. SUMMA CORP., 389 F. Supp. 1348, 1350 (D.Haw. 1975).

The salutory effect of punitive damages was cited by the Mississippi Court in STANDARD LIFE INSURANCE CO. OF INDIANA v. VEAL, 354 So.2d 239,248 (Miss. 1978):

> "If an insurance company could not be subjected to punitive damages it could intentionally and unreasonably refuse payment of a legitimate claim with veritable impunity. To permit an insurer to deny a legitimate claim, and thus force a claimant to litigate with no fear that claimant's maximum recovery could exceed the policy limits plus interest, would enable the insurer to pressure an insured to a point of desperation, enabling the insurer to force an inadequate settlement or avoid payment entirely."

In the instant case, CICA has not established that the jury's assessment of punitive damages violated the con-

stitutional rights of the defendant insurer. The verdict and judgment for punitive damages should be reinstated.

* * *

Dated this 14th day of April, 1987.

/s/ Peter Chase Neumann
Peter Chase Neumann
POB 1170 - Reno, NV 89504

/s/ William O. Bradley
William O. Bradley, Jr.
POB 1987 - Reno, NV 89505

For Appellant Thomas Ainsworth

OFFICE OF
CLERK OF THE SUPREME COURT
JUDITH FOUNTAIN, CLERK
CAPITOL COMPLEX
CARSON CITY, NEVADA 89710

May 15, 1987

TO: Peter Chase Neumann, Attorney at Law
Bradley & Drendel
Fahrenkopf, Mortimer, Sourwine, Mousel and Sloane
Lionel, Sawyer & Collins
Lambrose, FitzSimmons & Perkins
Galatz, Earl, Catalano & Smith

RE: Thomas Ainsworth and Evelyn Ainsworth v. Combined Insurance Co. of America et al, Case No. 17625.

ORAL ARGUMENT SCHEDULED: Wednesday, June 10, 1987 at 1:30 PM.
Supreme Court Building, Carson City

As you previously have been notified, the above case is scheduled for oral argument next month before the Supreme Court of Nevada. In the event the case need not or cannot be argued at the scheduled time, the Court will very much appreciate being informed within the next week.

If the matter has been settled, or is otherwise subject to dismissal without argument, please forward an appropriate stipulation. If settlement is a realistic prospect, you are particularly encouraged to commence settlement discussions at once. If a continuance appears necessary, a motion should be served and filed at once.

The Court's calendar time is limited, and other cases are waiting to be heard. Because of the preparation time necessary, a "stacking" system is not used. Therefore, when counsel unduly delay requests to cancel or postpone

argument, the Court's limited resources are unnecessarily expended.

We will appreciate your cooperation in assisting the Court to conduct its business in an orderly and efficient manner.

Sincerely,

/s/ Judith Fountain
JUDITH FOUNTAIN, Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 17625

THOMAS AINSWORTH,

Appellant,

vs.

COMBINED INSURANCE COMPANY OF AMERICA,

Respondent.

MOTION TO POSTPONE ARGUMENT

Respondent Combined Insurance Company of America ("Combined") hereby moves the Court to vacate the June 10, 1987 argument date and to hold this case pending the United States Supreme Court's decision in *Bankers Life and Casualty Co. v. Crenshaw*, 483 So.2d 254 (Miss. 1985), *prob. juris. noted*, ___ U.S. ___, 107 S.Ct. 1367, 94 L.Ed.2d 683 (No. 85-1765). *Bankers Life* presents federal issues similar or identical to those involved on this appeal. A "hold" is proper to conserve time, money, and judicial resources where, as here, the United States Supreme Court has accepted review of a case involving a potentially controlling question of federal law.

This motion is made pursuant to Rule 34(a) of the Nevada Rules of Appellate Procedure. It rests on the record and briefs on appeal, which discuss *Bankers Life* at length, and on the points and authorities which follow.

* * *

POINTS AND AUTHORITIES

This appeal involves a $5,939,500 punitive damages verdict, which the lower court set aside. The underlying insurance claim was for $9,600. In his opening brief and in the lower court appellant described *Bankers Life and Cas-*

ualty Co. v. Crenshaw, 483 So.2d 254 (Miss. 1985) as essentially "similar" to this case and presented it as his principal authority. Appellant's Opening Brief 25-27, 29-30; Plaintiffs' Opposition to Judgment N.O.V. or New Trial, RA 304-310, App. at 7. On March 9, 1987 the United States Supreme Court granted review in *Bankers Life* to consider this question, in addition to one other:

> Does $1.6 million punitive damages award against insurance company on insurance claim of $20,000 violate Excessive Fines Clause, or is award otherwise invalid under Contract and Due Process Clauses because award is grossly disproportionate to actual damages and vastly grater than any penalties prescribed by Mississippi legislature for similar or analogous improper business activities, or because award was imposed under standard of conduct newly formulated by court and applied retrospectively to conduct that occurred almost seven years before standard was announced?

Bankers Life, 55 U.S.L.W. 3065 (August 5, 1986), 55 U.S.L.W. 3607 (March 10, 1987).

The disparity between the punitive damages award and the underlying insurance claim is greater in this case than in *Bankers Life*. The federal constitutional issues are the same:

> Would reversal of the lower court's judgment n.o.v. and reinstatement of the jury's disproportionate punitive verdict, rendered on insufficient evidence and unconstitutionally vague instructions, result in a denial of Combined Insurance Company of America's rights to Due Process of Law and the imposition of an Excessive Fine, in derogation of the Eighth and Fourteenth Amendments to the United States Constitution?

Combined's Answering Brief 2; *see id.* 41-42, 54-57.

An appellate court "is to apply the law in effect at the time it renders its decision." *Bradley v. School Board*, 416 U.S. 696, 711 (1974). In the criminal context, into which Combined submits its Eighth Amendment challenge falls, new rules are constitutionally required "to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Griffith v. Kentucky*, ___ U.S. ___, 107 S.Ct. 708, 716, 93 L.Ed. 2d 649 (1987); *see Mackey v. United States*, 401 U.S. 667, 679 (1971) (per Harlan, J., concurring) ("simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule [is] indefensible").[1] A decision is not "final" for purposes of these rules until "the availability of appeal has been exhausted or lapsed, and the time for certiorari has passed." *Bradley*, 416 U.S. at 711 n.14; *see Linkletter v. Walker*, 381 U.S. 618 (1965), *cited with approval in Franklin v. State*, 98 Nev. 266, 646 P.2d 543 (1982) *and Klosterman v. Cummings*, 86 Nev. 684, 476 P.2d 14 (1970).

Bankers Life presents the same federal questions this case presents and will, provided this case is not rushed to final judgment, answer those potentially dispositive

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[1] For a discussion of the criminal nature of punitive damages see Grass, *The Penal Aspect of Punitive Damages*, 12 Hast. Const. L. Q. 241 (1985). The "retroactivity" principles discussed in the text apply in civil as well as criminal suits, unless "manifest injustice" will result to rights "that had matured or become unconditional." *Bradley*, 416 U.S. at 718, 720; *Klosterman, supra*. Appellant has no "right" or reliance interest in the jury's award of punitive damages. *Compare Nevada Cement Co. v. Lemler*, 89 Nev. 447, 451, 514 P.2d 1180, 1182 (1973) (a plaintiff "is never entitled to punitive damages as a matter of right") *with Allen v. Anderson*, 93 Nev. 204, 207, 562 P.2d 487, 489 (1977) (citation omitted) ("[p]unitive damages are not to compensate an injured person for the loss sustained but to punish a defendant for his conduct").

questions.[2] A temporary hold will avoid wasteful relitigation and also preserve Combined's Eighth and Fourteenth Amendment challenges intact. It is approved practice in the United States Supreme Court to hold cases where another case is pending involving the same or identical issues, R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* ¶¶ 4.16 and 5.9 (6th ed. 1986); this Court has endorsed the practice as well, *Jones v. State*, 101 Nev. 573, 580, 707 P.2d 1128, 1133 (1985). In fact, the United States Supreme Court appears currently to have placed on hold three cases which, like this case, include issues before that Court in *Bankers Life. Mobile Dodge, Inc. v. Alford*, 487 So.2d 866 (Ala. 1986), *appeal filed*, 55 U.S.L.W. 3093, 3130 (July 24, 1986) (No. 86-107); *Treadwell Ford, Inc. v. Campbell*, 485 So.2d 312 (Ala. 1986), *appeal filed*, 54 U.S.L.W. 3744, 3827 (May 7, 1986) (No. 85-1799); *American General Life and Accident Insurance Co. v. Miller*, ___ So.2d ___ (Miss. 1985), 54 U.S.L.W. 3600, 3675 (February 26, 1986) (No. 85-1429).

Appellant will no doubt argue that Combined did not preserve the *Bankers Life* issues since, according to him, Combined should have but did not did not raise them below and, further, failed to file a cross appeal.[3] *See* Appellant's

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[2] Appellant seemingly recognizes this as well. The due date on his reply brief was April 22, 1987 which, immediately on receipt of respondent's answering brief, he extended on motion to May 22, 1987. After further reflection, appellant filed his reply brief in advance even of its original due date, on April 14, 1987. He coupled it with a separate filing, entitled "Appellant's Request for Oral Argument," which is not required or contemplated by the Court's Rules. *See* Nev.R.App.P. 34(a) ("[t]he clerk *shall* advise all parties of the time and place at which oral argument will be heard") (emphasis added).

[3] Combined in fact challenged the judgment as "excessive" in the lower court. RA 173, App. at 6. Appellant's contrary argument notwithstanding, this is broad enough to include its Eighth Amendment challenge. *Cf. Swartz v. Adams*, 93 Nev. 240, 563 P.2d 74 (1977) (a claim for denial of due process was sufficiently stated where the pro-

Reply Brief 1-2, 20-23. These are the same arguments the respondent unsuccessfully made in *Bankers Life. See* Excerpts from Proceedings on Bankers Life's Jurisdictional Statement, attached as Exhibits 1 and 2. It is well-established, however, that a state procedural rule may not be invoked to defeat presentation of a substantial federal question unless that rule is "strictly" and "regularly" followed. *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964); *see also Hathorn v. Lovorn*, 457 U.S. 255 (1982). Neither of the procedureal "rules" appellant invokes to defeat Combined's constitutional questions qualifies as "strictly" or "regularly" followed. *See, e.g., McCullogh v. State*, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983) ("when constitutional questions are raised on appeal [this Court] has the power to address them," whether or not they were raised below), *cited with approval in Natchez v. State*, 102 Nev. ___, 721 P.2d 361 (1986); *Leonard v. Bowler*, 72 Nev. 165, 298 P.2d 475 (1956) (this Court can waive even a required cross-appeal). Furthermore, Combined *prevailed* in the lower court. It is entitled to assert any ground in support of that court's judgment, whether or not the ground was relied on or considered by the lower court, so long as it does not thereby ask to expand the rights determined by the judgment. *See Colautti v. Franklin*, 439 U.S. 379, 396 n.16 (1979) and cases discussed in Combined's Answering Brief 47 n.22, 56-57.

Nor can appellant legitimately claim prejudice from the temporary delay a hold will create.[4] Combined has paid in full the $9,600 the jury found due under the policy, the $200,000 in additional compensatory damages the jury as-

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ponent of it alleged the notice given was not "reasonably calculated" to give actual notice, even though he did not specify this as a due process or Fourteenth Amendment challenge).

[4] The Clerk's Office of the United States Supreme Court advises that Appellant's Opening Brief will be filed on May 29, 1987 and the case should be argued in November or December.

sessed, and all costs and charges associated with either. *See* Partial Satisfaction of Judgment, RA 758-760, App. at 14. All that remains is the issue of punitive damages. Such damages implicate Combined's rights far more than they do any claim of right by the appellant. *Compare Nevada Cement Co. v. Lemler*, 89 Nev. at 451, 514 P.2d at 1182 (a plaintiff "is never entitled to punitive damages as a matter of right") *with Allen v. Anderson*, 93 Nev. at 206, 562 P.2d at 489 ("punitive damages are awarded for sake of example and by way of punish[ment]"); *see generally Travelers Indemnity Co. v. Anderson*, 442 N.E.2d 349, 362-63 (Ind. 1982) and cases discussed in Combined's Answering Brief at 46-48.

CONCLUSION

For all the foregoing reasons, Combined requests that further proceedings in this case be deferred pending decision of *Bankers Life*.

Dated this 15th day of May, 1987.

Respectfully submitted,

STEVE MORRIS
M. KRISTINA PICKERING
LIONEL SAWYER & COLLINS

By /s/ M. Kristina Pickering
M. Kristina Pickering
1700 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101

DOUGLAS A. SLOANE
MORTIMER, SOURWINE, MOUSEL, SLOANE & KNOBEL
333 Marsh Avenue
Reno, Nevada 89504

Attorneys for Respondent

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 17625

THOMAS AINSWORTH,

Appellant,

vs.

COMBINED INSURANCE COMPANY OF AMERICA,

Respondent.

OPPOSITION TO MOTION TO POSTPONE ARGUMENT

* * *

3. (a) THERE IS NO REASON TO SUGGEST THAT THE SUPREME COURT WILL ALTER OR ABOLISH ONE HUNDRED YEARS OF CASELAW ON PUNITIVE DAMAGES, IN THE CRENSHAW CASE.

Combined suggests that the U.S. Supreme Court's granting of review in the *Crenshaw* case somehow implies that it is likely to rule that "disparity" between the amount of compensatory damages assessed by the jury, and the amount of punitive damages, violates the Eighth Amendment to the Constitution.

Yet, *Bankers Life & Cas. Co. v. Crenshaw*, 483 So.2d 254 (Miss. 1985) involved a *number of issues*, one of which was the propriety of a punitive damages award in a bad faith case. The Mississippi Supreme Court affirmed the jury's assessment of $1.6 million in punitive damages, in addition to $20,000 in compensatory damages, recognizing that:

> "Punitive damages are an important component of the remedial side of our law whose pur-

> pose is the protection of the customer. . . Bankers life played the odds in this case and lost. . . Punitive damages in such a case is an appropriate, and perhaps, the only remedy. In this kind of case, it is the medicine most likely to cure the malady."

483 So.2d 254, at 276. *Cf., K-Mart Corp. v. Ponsock*, 103 Nev. Adv. Op. 10, 732 P.2d 1364 (1987), wherein this Court stated:

> "The use of punitive damages in appropriate cases of breach of the duty of good faith and fair dealing expresses society's disapproval of exploitation by a superior power and creates a strong incentive for employers to conform to clearly defined legal duties. Such duties are so explicit and so subject of common understanding as to justify the punitive award."

3. (b) BANKERS LIFE V. CRENSHAW INVOLVES ISSUES DIFFERENT THAN THOSE BEFORE THIS COURT IN THE INSTANT APPEAL

In 55 USLW 3600, dated 3-10-87, the Summary of Orders for Review Granted describes Case No. 85-1765, *Bankers Life & Casualty Co. v. Crenshaw*, as presenting the following questions:

> (1) Is Mississippi statute that automatically imposes on unsuccessful defendant-appellant mandatory penalty of 15 percent of any money judgment, irrespective of merits of appeal, but that imposes no corresponding burden on appeal by unsuccessful plaintiff-appellant, whether frivolous or not, unconstitutional under Equal Protection Clause?
>
> (2) Does $1.6 million punitive damage award against insurance company on insurance claim of $20,000 violate Excessive Fines Clause, or is

award otherwise invalid under Contract and Due Process Clauses because award is grossly disproportionate to actual damages and vastly greater than any penalties prescribed by Mississippi legislature for similar or analogous improper business activities, or because award was imposed under standard of conduct newly formulated by court and applied retrospectively to conduct that that occurred almost seven years before standard was announced?"

As will be discussed in section 4, below, these questions are not involved in the instant case of Ainsworth v. Combined Insurance Co. of America.

3. (c) The U.S. SUPREME COURT IS NOT LIKELY TO HOLD THAT PUNITIVE DAMAGES VIOLATE THE CRUEL AND UNUSUAL PUNISHMENT PROHIBITION OF THE EIGHTH AMENDMENT

Despite Combined's argument that *Bankers Life v. Crenshaw* presents "the same federal questions this case presents," this is a mischaracterization of the issues. Ainsworth v. Combined, the instant case, actually involves one issue: whether the district judge complied with—or failed to comply with—this Court's appellate standard of review in voiding the jury's assessment of punitive damages.

Thus the issue here is whether there was any substantial evidence presented at the jury trial to support the jury's verdict which was voided by the trial judge. *Stackiewicz v. Nissan Motor Corp.*, 100 Nev. 443, 686 P.2d 925 (1984).

Because of Combined's failure to cross-appeal, and its failure to affirmatively plead, prove, or argue constitutional issues at the district court level, Combined should be precluded from raising such issues now. *Holland Livestock v. B & C Enterprises*, 92 Nev. 473, 553 P.2d 950 (12976), *Alves v. Bumguardner*, 91 Nev. 799, 544 P.2d 436 (1975).

If Combined's federal constitutional rights have been violated by the imposition of punitive damages in this case, Combined will no doubt seek review of the case by the U.S. Supreme Court. However, it seems unlikely that that Court will hold that punitive damages are violative of the Eighth Amendment, even if it should decide the *Crenshaw* case.

For it to do so, the Court would necessarily overrule more than 100 years of its own precedent. In the 1983 case of *Smith v. Wade*, 103 S.Ct. 1625, 461 U.S. 30, 75 L.Ed.2d 632, the Supreme Court held that a prison guard could be held liable for punitive damages upon a finding of reckless or careless disregard or indifference to an inmate's rights *or* safety. The majority opinion was signed by Justices Brennan, White, Marshall, Blackmun and Stevens, all of whom are still on the Court.

A reading of *Smith v. Wade* leads to the conclusion that the Supreme Court not only approves of the concept of punitive damages, but that its standards for their assessment are probably not as strict as the standard in Nevada. At issue in *Smith v. Wade*, a case involving a youthful offender who was placed (by Smith) in a cell with two cellmates who harassed, beat and sexually assaulted Wade, was the propriety of the following jury instruction:

> "In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.
>
> "If you find the issues in favor of the plaintiff, and if the conduct of one or more of the defendants is shown to be *a reckless or callous disregard of, or indifference to, the rights or safety of others*, then you may assess punitive or ex-

emplary damages in addition to any award of actual damages.

"... The amount of punitive or exemplary damages assessed against any defendant may be such sum as you believe will serve to punish that defendant and to deter him and others from like conduct." (Emphasis by Court).

Smith v. Wade, 461 U.S. at 33.

Just as Combined concedes the propriety of the verdict for compensatory damages, Smith did not challenge the correctness of the verdict for compensatory damages, but only the instructions and verdict for punitive damages. In affirming, the U.S. Supreme Court chronicled the history of the legal concept of punitive damages in the United States, stating that:

"... Although there was debate about the theoretical correctness of the punitive damages doctrine in the latter part of the last century, the doctrine was accepted as settled law by nearly all state and federal courts, including this Court." (Citing numerous authorities from 1852 to the present, in FN 3, 4, 5, 10, 12, 13, 14, 16, 17, 18, 19, 20).

Smith v. Wade, 461 U.S. at 35.

In rejecting Smith's argument that the proper test for punitive damages is one of actual malicious intent—"ill will, spite, or intent to injure," the Court discussed the history of 19th century and 20th century standards for punitive damages.

"... On the contrary, the rule in a large majority of jurisdictions was that punitive damages (also called exemplary damages, vindictive damages, or smart money) could be awarded without a showing of actual ill will, spite, or intent to

> injure. This Court so stated on several occasions, before and shortly after 1871."

Smith v. Wade, 461 U.S. at 41.

Indeed, as the *Smith v. Wade* Court points out, there was at least dictum to suggest that perhaps even "gross negligence" would suffice, at least in some cases. (Citing *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 521 (1885)).

Smith v. Wade, 461 U.S. 44.

> ". . . The large majority of state and lower federal courts were in agreement that punitive damage awards did not require a showing of malicious intent; they permitted punitive awards on variously stated standards of negligence, recklessness, or other culpable conduct short of actual malicious intent."

Smith v. Wade, 461 U.S. 45; (Citing, in FN 12, *Welch v. Durand*, 36 Conn. 182 (1869) where the court held that punitive damages were proper where the defendant's pistol bullet, fired at a target, ricocheted and hit the plaintiff. Held: punitive damages proper if the act is "wanton, reckless, without due care, and grossly negligent.").

The *Smith v. Wade* Court next turned to the authority of Restatement (Second) of Torts (1979), citing with approval its admonition that:

> "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive *or his reckless indifference to the rights of others.*" Sec. 908(2) (emphasis added)."

Smith v. Wade, 461 U.S. 47.

Giving due deference to the individual states' treatment of this subject, the U.S. Supreme Court stated:

> ". . . Most cases under state common law, although varying in their precise terminology, have

> adopted more or less the same rule, recognizing that punitive damages in tort cases may be awarded not only for actual intent to injure or evil motive, but also for recklessness, serious indifference to or disregard for the rights of others, or even gross negligence."

Smith v. Wade, 461 U.S. 47-48 (and citing numerous cases in FN 13, from Alaska to Wisconsin).

Finally, the U.S. Supreme Court put to rest Smith's argument that there should be a different standard required for the application of punitive damages in a Sec. 1983 Civil Rights case, holding against that contention. In so doing, the Supreme Court gave continued approval to the legal doctrine of punitive damages in civil cases.

> ". . . Smith contends that even if section 1983 does not ordinarily require a showing of actual malicious intent for an award of punitive damages, such a showing should be required in this case. He argues that the deterrent and punitive purposes of punitive damages are served only if the threshold for punitive damages is higher in every case than the underlying standard for liability in the first instance. . . Hence, Smith argues, the District Judge erred in not requiring a higher standard for punitive damages, namely, malicious intent.
>
> "This argument incorrectly assumes that, simply because the instructions specified the same *threshold* of liability for punitive and compensatory damages, the two forms of damages were equally available to the plaintiff. The argument overlooks a key feature of punitive damages—that they are never awarded as of right, no matter how egregious the defendant's conduct. "If the plaintiff proves sufficiently serious misconduct on the defendant's part, the question

whether to award punitive damages is left to the jury, which may or may not make such an award." D. Dobbs, Law of Remedies 204 (1973) (footnote omitted). FN 14. Compensatory damages, by contrast, are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss. FN 15. Hence, it is not entirely accurate to say that punitive and compensatory damages were awarded in this case on the same standard. To make its punitive award, the jury was required to find not only that Smith's conduct met the recklessness threshold (a question of ultimate fact), but *also* that his conduct merited a punitive award of $5,000 in addition to the compensatory award (a discretionary moral judgment).

"Moreover, the rules of ordinary tort law are once more against Smith's argument. There has never been any general common-law rule that the threshold for punitive damages must always be higher than that for compensatory liability. On the contrary, both the First and Second Restatements of Torts have pointed out that "in torts like malicious prosecution that require a particular antisocial state of mind, the improper motive of the tortfeasor is both a necessary element in the cause of action and a reason for awarding punitive damages." FN 16. Accordingly, in situations where the standard for compensatory liability is as high as or higher than the usual threshold for punitive damages, most courts will permit awards of punitive damages without any extra showing. Several courts have so held expressly. FN 17. Many other courts, not directly addressing the congruence of compensatory and punitive thresholds, have held that

punitive damages are available on the same showing of fault as is required by the underlying tort in, for example, intentional infliction of emotional distress, FN 18, defamation of a public official or public figure, FN 19, and defamation covered by a common-law qualified immunity. FN 20.

"This common-law rule makes sense in terms of the purposes of punitive damages. Punitive damages are awarded in the jury's discretion "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts, section 908(1) (1979). The focus is on the character of the tortfeasor's conduct—whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards. If it is of such a character, then it is appropriate to allow a jury to assess punitive damages; and that assessment does not become less appropriate simply because the plaintiff in the case faces a more demanding standard of actionability. To put it differently, society has an interest in deterring and punishing *all* intentional or reckless invasions of the rights of others, even though it sometimes chooses not to impose any liability for lesser degrees of fault. FN 21."

Smith v. Wade, 461 U.S. 30, at 51-55 (1983).

Appellant Thomas Ainsworth's appeal is from a district judge's order vacating an assessment of punitive damages in a case where the jury *necessarily* found that Combined's conduct was either malicious, fraudulent or oppressive. Jury Instruction No. 24 [ROA 147, Appendix-6 of Appellant's Reply Brief] instructed the jury that the concept of punitive damages was distinct from that of compensatory damages (covered in Instruction No. 23. This instruction

clearly instructed the jury that *before* it could even *consider* whether to assess additional, punitive, damages, it first had to find the defendant had committed oppression, fraud or malice, *in addition* to breaching the covenant of good faith and fair dealing.

> ". . . Mere breach of the covenant of good faith and fair dealing is not sufficient to justify an award of punitive damages. You must find by a preponderance of the evidence that said defendant was guilty of oppression, fraud or malice, express or implied, in the conduct upon which you base your finding of liability . . ."

Thus the plaintiff in the Ainsworth v. Combined trial was held to a higher standard, before the jury could assess punitive damages, than the standard approved by the U.S. Supreme Court in *Smith v. Wade*. There, the Court approved a jury instruction that required only that the defendant's conduct amount to "reckless or callous disregard of, or indifference to, the rights or safety of others." 461 U.S. 30, at 33.

4. IT IS VERY DOUBTFUL THAT THE UNITED STATES SUPREME COURT WILL DECIDE ANY ISSUES RELEVANT TO THIS APPEAL

Combined asks this Court to delay oral argument on this appeal until next term or until such time as the United States Supreme Court renders a decision in a case recently granted review, *Bankers Life and Casualty Co. v. Crenshaw*. Combined's request is based upon the bare assertion that a delay will "preserve Combined's Eighth and Fourteenth Amendment challenges intact." (Motion to Postpone Argument, p. 4, lls. 12-13). In fact, there are no such challenges to preserve.

Moreover, such a postponement would not only be unprecedented, but could not be supported on any legal basis. The issues raised by Bankers Life are irrelevant to the immediate case. And there is no solid assurance that the

United States Supreme Court will even consider the merits of the limited issue which interests Combined.

The United States Supreme Court noted *probable* jurisdiction to hear the appeal in *Bankers Life and Casualty Co. v. Crenshaw*. 55 USLW 3607 (March 10, 1987). Appellants presented two questions for review. 55 USLW 3600 (March 10, 1987). The first was whether a Mississippi statute imposing automatic penalties upon unsuccessful defendant-appellants, *but not* upon unsuccessful plaintiff-appellants, violated the Equal Protection Clause of the United States Constitution. The United States Supreme Court has previously indicated an interest in hearing this issue. (See cases cited in Motion to Postpone Argument, p. 5, lls. 9-15). Bankers Life appears to have properly preserved the penalty issue for appeal; but, of course, it has no bearing on the instant case.

The second issue raised by Bankers Life concerns the constitutionality of a punitive damages award. It is questionable whether the Supreme Court will even reach the merits of this issue because of the failure of Bankers Life to raise the related federal questions in the trial court or on appeal below. *See generally, Bankers Life and Casualty Co. v. Crenshaw*, 433 So.2d 254 (Miss. 1985). The Supreme Court may conclude at the time of plenary review that no federal issues relating to punitive damages were presented in the record below. *See, Bostic v. United States*, 402 U.S. 547 (1971); *Jones v. State Board of Education*, 397 U.S. 31 (1970); *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972).

Although the Supreme Court has noted probable jurisdiction, the Court has on numerous occasions dismissed such appeals—after granting review—because of the appellant's failure to preserve the issues below. *See, e.g., Hunt v. Collins*, 457 U.S. 1127 (1982); *Doe v. Delaware*, 450 U.S. 382 (1981); *Ford Motor Co. v. Pace*, 364 U.S. 444 (1960); *Anderson v. Thorrington Construction Co.*, 363

U.S. 719 (1960). If the Court determines that the Missisippi Supreme Court did not consider—and need not have considered—the asserted federal claims, the Court can properly dismiss the portion of the appeal dealing with punitive damages. *See, Newsom v. Smyth*, 363 U.S. 604, 604-05 (1961); *Benz v. New York State Thruway Authority*, 369 U.S. 147 (1962). It is therefore eminently possible that a dismissal will occur on this issue when the matter is fully presented to the Court.

Moreover, the precise punitive damages questions raised—even assuming they were preserved—have no relevance to this case. There is no issue before this Court related to Equal Protection and retroactivity. Bankers Life has challenged the *retrospective* application of a newly created standard of conduct to activities which had occurred a number of years in the past. This issue is not relevant to the instant appeal. It was not raised on cross-appeal by Combined; moreover, it is not disputed that both the action for bad faith and the standard of conduct necessary to impose punitive damages were recognized in Nevada long before any date pertinent to this case. *See, e.g., United States Fidelity & Guaranty Co. v. Peterson*, 91 Nev. 617, 540 P.2d 1070 (1975); *Nevada Cement Co. v. Lemler*, 89 Nev. 447, 514 P.2d 1180 (1973).

A secondary issue raised by Bankers Life concerns the proportionality of the amount of punitive damages awarded compared to penalties imposed under Mississippi statutes governing improper business activities. Proportionality is *not* an issue in the instant case before this Court. The only issue before this Court relevant to punitive damages is whether there was substantial evidence in the record to support any award of punitive damages.

In any event, it is almost inconceivable that the United States Supreme Court would find merit in the disproportionality argument raised by Bankers Life. Not only has the Court continued to affirm the propriety of punitive

damages as an instrument of social policy, *Wade v. Smith, supra*, but it has been loath to apply proportionality as a constitutional test for punishment even in those situations involving sentences to life imprisonment. *See, e.g., Rummel v. Estelle*, 445 U.S. 263 (1980); *cf. Solem v. Helm*, 463 U.S. 277, 313 (Burger, C.J., dissenting).

Combined has not raised any reasonable basis for delaying argument in this case. It is ludicrous to ask this Court to disrupt its calendar to await a decision so patently unrelated to the case at hand.

SUMMARY AND CONCLUSION

Following considerable delay in filing its Answering Brief on Appeal, respondent Combined Insurance Co. of America now seeks yet a further delay, by its eleventh hour filing of a Motion to Postpone Argument.

Combined's motion is not "filed reasonably in advance of the hearing", as required by NRAP Rule 34(a).

Combined's motion is not meritorious. There is no evidence that the Supreme Court of the United States intends to abolish or substantially alter the common-law of punitive damages. *Smith v. Wade*, 461 U.S. 30 (1983).

Combined's motion ought to be denied, and the oral argument now set for June 10th, should be retained.

Respectfully submitted.

Dated this 25th day of May, 1987

/s/ Peter Chase Neumann
Peter Chase Neumann

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No. 17625

THOMAS AINSWORTH,

Appellant,

vs.

COMBINED INSURANCE COMPANY OF AMERICA,

Respondent.

RESPONDENT'S SUPPLEMENTAL MEMORANDUM OF AUTHORITIES

Appellant Thomas Ainsworth ("Ainsworth") devotes his reply brief to a confused and inaccurate discussion of "retroactivity," cross-appeals, and appellate procedure generally. He fails to come to terms with the central issue: Was not the lower court correct when it found that, argument and emotionalism aside, this case does not involve substantial evidence of oppression or malice-in-fact? He also does not deal adequately with "clear and convincing" as the proper evidentiary standard in punitive damage cases, or the recent constitutional developments under the Eighth and Fourteenth Amendments in this area.

Respondent Combined Insurance Company of America ("Combined") addressed each of these points in its answering brief. Pursuant to Rule 31(d) of the Nevada Rules of Appellate Procedure, Combined hereby supplements its brief with citation to the following authorities:

* * *

5. Beckman, *Constitutional Issues in Insurance Claim Litigation*, XXII Tort and Insurance L.J. 244 (1987).

Copies of these cases and the Beckman article are attached. Also attached are copies of the jurisdictional statement, motion to dismiss, and reply brief in *Bankers Life and Casualty Co. v. Crenshaw*, 483 So.2d 254 (Miss. 1985), *prob. juris. noted*, ___U.S. ___, 107 S.Ct. 1367, 94 L.Ed.2d 683 (No. 85-1765), Recommendation No. 5 of the Report to the ABA of the Action Commission to Improve the Tort Liability System, respecting punitive damages, and the ABA's notice of its House of Delegates' adoption of Recommendation No. 5.

* * *

EXHIBITS TOO VOLUMINOUS

TO REPRINT IN THIS APPENDIX.

They included complete copies of the jurisdictional statement, motion to dismiss, and reply in support of jurisdictional statement in *Banker's Life and Casualty Co. v. Crenshaw*, Case No. 85-1765. They also included a copy of Beckman, Constitutional Issues in Insurance Litigation, XXII Tort and Insurance Law Journal 244 (1987) and a certified copy of Exhibit T to Combined's Annual Statement, as filed in Nevada. That Annual Statement shows, among other things, that Combined's total revenues in Nevada in 1986 were less than $1,500,000.

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 17625

THOMAS AINSWORTH and EVELYN AINSWORTH,
Appellants,

vs.

COMBINED INSURANCE COMPANY OF AMERICA, RONALD IOVENELLI, HERMAN BACA,
Respondents.

FILED

MAY 29 1987

/s/ Sharon Page
JUDITH FOUNTAIN
Clerk, Supreme Court

ORDER

This is an appeal from an order of the district court granting respondents a judgment notwithstanding the verdict of the jury. Respondents have moved to vacate the oral argument presently scheduled for June 10, 1987, and to hold this appeal in abeyance pending the decision of the United States Supreme Court in an unrelated case which respondents assert raises the same federal issues as this appeal. Appellants oppose respondents' motion on the grounds that (1) it is untimely; (2) the case before the United States Supreme Court is unrelated to this case and does not raise the same issues; (3) there is no indication that the United States Supreme Court will actually decide any issue relevant to the issues presently before this court simply because the United States Supreme Court has noted

probable jurisdiction in that case; (4) there is no indication that the United States Supreme Court will overturn its prior decisions upholding the constitutionality of punitive damages in the case now before it; and (5) judicial economy will not be served by holding every case pending before this court in abeyance when a similar issue is being considered in an unrelated case by the United States Supreme Court.

We agree with appellants. It appears that the case presently pending before the United States Supreme Court is based on a specific statute making punitive damages mandatory in some cases. No such statute is involved in this case. It also appears that the United States Supreme Court may not reach any issue that is directly relevant to this case. Further, the issue before this court appears to be the propriety of the district court's order granting a judgment not withstanding the verdict under the circumstances of this case, rather than the constitutionality of punitive damages generally. Finally, a substantial amount of the court's resources has already been expended in preparing for the argument, and, at this late date, another matter cannot be scheduled in its place. Consequently, we deny the motion. Oral argument shall remain scheduled for June 10, 1987.

It is so ORDERED.

/s/ Gunderson, C. J.

/s/ Steffen, J.

/s/ Young, J.

cc: Peter Chase Neumann
Bradley & Drendel
Fahrenkopf, Mortimer, Sourwine,
Mousel & Sloane
Lionel, Sawyer & Collins

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No. 17625

THOMAS AINSWORTH,

Appellant,

vs.

COMBINED INSURANCE COMPANY OF AMERICA,

Respondent.

FILED

JUNE 1 1988

JUDITH FOUNTAIN
Clerk, Supreme Court

RESPONDENT'S SECOND SUPPLEMENTAL MEMORANDUM OF AUTHORITIES

Significant cases have been decided in the year that has passed since this case was submitted to the Court. This supplement is filed for the purpose of bringing those cases and other recent and pertinent authorities to the Court's attention.

* * *

2. The Constitutional Issues: Due Process and the Excessive Fines Clause.

On May 16, 1988, the United States Supreme Court decided *Bankers Life and Casualty Co. v. Crenshaw*, 56 U.S.L.W. 4418 (1988). Only seven of that Court's nine Justices participated in the case. Although it recognized "the great public importance of the issues involved," the

Court declined to consider the constitutionality of punitive damages because the issue had not been raised in the Mississippi Supreme Court until rehearing. Joined by Justice Scalia, Justice O'Connor wrote separately to emphasize that the insurer in *Bankers Life*,

> has touched on a due process issue that I think is worthy of the Court's attention in an appropriate case. Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause.
>
> Punitive damages are awarded not to compensate for injury but, rather, 'to punish reprehensible conduct and to deter its future occurrence.' *Gertz v. Welch, Inc.*, 418 U.S. 323, 350 (1974). Punitive damages are not measured against actual injury, so there is no objective standard that limited their amount. Hence, 'the impact of these windfall recoveries is unpredictable and potentially substantial.' *Electrical Workers v. Foust*, 442 U.S. 42, 50 (1979). For these reasons, the Court has forbidden the award of punitive damages in defamation suits brought by private plaintiffs, *Gertz, supra*, at 349-350, and in unfair representation suits brought against unions under the Railway Labor Act, *Electrical Workers, supra*, at 52. For similar reasons, the Court should scrutinize carefully the procedures under which punitive damages are awarded in civil lawsuits.
>
> Under Mississippi law, the jury may award punitive damages for any common law tort committed with a certain mental state, that is, 'for a willful and intentional wrong, or for such gross negligence and reckless negligence as is equiva-

> lent to such a wrong.' 483 So. 2d 254, 269 (Miss. 1985) (opinion below). Although this standard may describe the required mental state with sufficient precision, the amount of the penalty that may ensue is left completely indeterminate. As the Mississippi Supreme Court said, 'the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury.' *Id.*, at 278. This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process. The Court has recognized that 'vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.' *United States v. Batchelder*, 442 U.S. 114, 123 (1979). Nothing in Mississippi law warned appellant that by committing a tort that caused $20,000 of actual damages, it could expect to incur a $1.6 million punitive damage award.

56 U.S.L.W. at 4423.

The jury in this case, like the Mississippi jury in *Banker's Life* and the Alabama jury in *Aetna Life Insurance Co. v. Lavoie*, 106 S.Ct. 1580 (1986), exercised standardless discretion in returning its punitive damage award. In Nevada, as in Mississippi and Alabama,

> the assessing of punitive damages is wholly subjective. There are no objective standards by which the monetary amount can be calculated.

Nevada Cement Co. v. Lemler, 89 Nev. 447, 452, 514 P.2d 1180, 1183 (1973).

The "*clearly* disproportionate" standard stated in *Ace Truck & Equipment Rentals v. Kahn*, 103 Nev. Adv. Op. 107, 746 P.2d 132 (1987) (emphasis in original) does not resolve the real and substantial due process issue in this

case. *Ace Truck* does not address the standards that must be met by a plaintiff to go to the jury on punitive damages—or the factors the jury should consider in determining when and in what amount to award them. Thus *Lemler* is unaffected by *Ace Truck* because it addresses appellate review standards for punitive damages. The Court's most recent opinion on punitive damages does not deal with the standardless exercise of discretion by a jury that greatly troubled Justices O'Connor and Scalia in *Bankers Life*.

Furthermore, *Ace Truck* places the burden of *disproving* the propriety of a punitive damage award on the defendant. In so doing it inverts the heightened burden of proof other courts, construing due process challenges to punitive damage awards, impose on the *proponents* of such claims. *See* Combined's Answering Brief, pp. 44-48 (due process and fundamental fairness require that "clear and convincing" evidence should be the plaintiff's required burden of proof in punitive damage cases). Reinstatement of the jury's punitive damage verdict in this case would violate both Combined's Eighth and Fourteenth Amendment Rights. *See* Combined's Answering Brief, pp. 4, 44-48, & 54-57; Combined's Supplemental Memorandum, pp. 10-18.

Further corroborating Combined's arguments on the Eighth Amendment point is the Georgia Supreme Court's March 17, 1988, decision in *Colonial Pipeline Co. v. Brown*, 365 S.E.2d 287 (1988). In *Colonial Pipeline*, a plurality of the Georgia Supreme Court invalidated a $5,000,000 punitive damage award based on the Excessive Fines Clause of the Georgia Constitution which, like Nevada's Excessive Fines Clause, is identical to that found in the Eighth Amendment to the United States Constitution. Nev.Const., art. 1, sec. 6. *See also* Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 Vand.L.Rev. 1233 (1987); Geller & Levy, *The Constitutionality of Punitive Damages*, 73 A.B.A.J. 88 (Dec. 1987); Egelko, *Are Punitive Damages An Endangered Species?*, 1988 Calif. Lawyer 47 (April 1988).

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No. 17625

THOMAS AINSWORTH,

Appellant,

vs.

COMBINED INSURANCE COMPANY OF AMERICA,

Respondent.

FILED

JUL 5 1988

JUDITH FOUNTAIN
CLERK, SUPREME COURT

APPELLANT'S FIRST SUPPLEMENTAL MEMORANDUM OF AUTHORITIES

Appellant Thomas Ainsworth concurs with the Respondent's statement that significant cases have been decided in the year since the case was submitted to this Court. Additionally, since the filing of respondent Combined's second supplemental memorandum of authorities, the United States Supreme Court has *denied certiorari* in a number of punitive damage cases.

A. THE PROPER ASSESSMENT OF PUNITIVE DAMAGES

In *Bankers Life & Casualty Co. v. Crenshaw*, ___U.S. ___, No. 85-1765, May 16, 1988, the United States Supreme Court *affirmed* a $1.6 million dollar punitive damages judgment in addition to a $20,000 compensatory judgment against an insurance company, the facts of which were similar to the instant case. The Supreme Court held

that the Eighth Amendment's Excessive Fines Clause issue was not properly raised before, or decided by the court below, *and was therefore not properly before the U.S. Supreme Court.*

In deferring to the Mississippi Supreme Court, the high Court stated that:

> "Our review of appellant's claim now would short-circuit a number of less intrusive, and possibly more appropriate, resolutions: the Mississippi State Legislature might choose to enact legislation addressing punitive damage awards for bad-faith refusal to pay insurance claims; failing that, the Mississippi state courts may choose to resolve the issue; by relying on the state constitution or on some other adequate and independent federal ground; and failing that, the Mississippi Supreme Court will have its opportunity to decide the question of federal law in the first instance, while any ultimate review of the question that we might undertake will gain the benefit of a well-developed record and a reasoned opinion on the merits. We think it unwise to foreclose these possibilities, and therefore decline to address appellant's challenges to the size of the punitive damage award."

Bankers Life & Casualty Co. v. Crenshaw, No. 85-1765, 56 U.S.L.W. 4418, at 4420-4421. (Affirming *Bankers Life & Casualty Co. v. Crenshaw*, 483 So.2d. 254 (Miss. 1987) wherein the Mississippi Supreme Court held:

> "Conduct such as exemplified by Bankers Life in this case is harmful to the insured public. The company violated standards of conduct enunciated by this Court. It grossly violated its own in-house procedure for *investigating a claim* (emphasis supplied). Its executive personnel had to realize that a full and complete investigation

> posed a very strong likelihood of dissipating any contention that Crenshaw's trauma had absolutely nothing to do with the loss of limb. Yet they simply denied the claim for an invalid reason, especially deceptive in this case because *on the surface* and to the uninitiated it appeared valid. Why did they not fully investigate so that their doctor would have all the facts? Was it *because* they thought the full facts would be *favorable* to them, or *unfavorable*? We must conclude the latter. They clearly recognized they were skirting a bad faith cause of action, but still played the odds.
>
> Conduct of an insurance company not authorized by law which carries with it a potentiality of great harm to the insurance public is an outrage, and should be condemned. Punitive damages in such a case is an appropriate, and perhaps the only remedy. In this kind of case, it is the medicine most likely to cure the malady."

Bankers Life & Casualty Co. v. Crenshaw, 483 So.2d 254, at 276.

On May 31, 1988, the United States Supreme Court denied certiorari in the case of *Ohio Casualty Ins. Co. v. Downey Savings & Loan Assn*, ___U.S. ___, Case No. 87-159.

In the underlying case, *Downey Savings & Loan Ass'n v. Ohio Casualty Insurance Co.*, 234 Cal.Rptr 835, 189 Cal.App.3d 1072, review denied by Calif. Supreme Court May 27, 1987, the California Court of Appeals *affirmed* an award of $152,983 in compensatory damages and $5 million in punitive damages to an insured in a bad faith action arising under a fidelity bond.

In *Downey*, the defendant insurer raised the Eighth and Fourteenth Amendment issues articulated by Combined in the instant case. At pages 851-2, the *Downey* Court stated:

> "Ohio claims the punitive damage award violates the Eighth Amendment's prohibition against the imposition of excessive fines. We have already concluded the award is not excessive as a matter of law. Moreover, the Eighth Amendment *applies only to criminal actions, not to purely civil penalties, as involved here.* (*Ingraham v. Wright* (1977), 430 U.S. 651, 664, 97 S.Ct. 1401, 1408, 51 L.Ed.2d 711; *Zwick v. Freeman* (2d Cir. 1967) 373 F.2d 110, 119.)" (Emphasis supplied)
>
> "Ohio also contends the punitive damage award was imposed in a civil action " 'unaccompanied by the types of safeguards present in criminal proceedings,' " in violation of the Fourteenth Amendment due process clause. Where, as here, the action is civil in nature, civil rules rather than criminal rules of procedure apply. . . Besides, Ohio has failed to identify the "safeguards" it was allegedly denied. We conclude the award of penal damages made under civil rules of procedure did not violate any of Ohio's constitutional rights. . . ."

By denying certiorari in the *Downey* case, the United States Supreme Court has refused to consider the constitutional issues raised by Combined in its answering brief and in its supplemental memorandum of points and authorities. *See, also,* the case of *Playtex Holdings v. O'gilvie,* ___U.S. ___, Case No. 87-1021, wherein the Supreme Court *denied certiorari* of a petition in a case wherein the jury assessed compensatory damages of $1.2 million and punitive damages of $10 million.

Hence, based upon the affirmation of the *Crenshaw v. Bankers Life* judgment, and the denial of certiorari in cases such as *Downey Savings* and *Playtex Holdings*, in 1988, it can be stated that the United States Supreme Court has clearly not shown an inclination to hold punitive damages

unconstitutional. (The appropriateness of the assessment of punitive damages of less than 1% of Combined's 1985 earnings in this case has been thoroughly briefed, and will therefore not be further argued herein).

* * *

Dated this 8th day of July, 1989.
/s/
Peter Chase Neumann
Att'ys for Appellant

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No. 17625

POINTS OF ORDER

THOMAS AINSWORTH,

Appellant,

vs.

COMBINED INSURANCE COMPANY OF AMERICA,

Respondent.

STATEMENT

Respondent Combined Insurance Company of America ("Combined") respectfully submits the following points of order to correct the misstatements that appear in appellant's "First Supplemental Memorandum of Authorities." However unintentional, the misstatements are serious. This case is too important, both to Combined and to others involved in punitive damage litigation in this State, to permit the misstatements to go unanswered and become a part of this record.

Combined's points of order are these:

* * *

4. United States Supreme Court Cases

Appellant cites the jurisdictional dismissal in *Bankers Life & Casualty Co. v. Crenshaw*, 108 S.Ct. 1645 (May 16,

1988), and the denial of certiorari in *Ohio Casualty Insurance Co. v. Downey Savings & Loan Ass'n*, 108 S.Ct. 2023 (May 31, 1988), as support for the proposition that "the United States Supreme Court has clearly not shown an inclination to hold punitive damages unconstitutional." Appellant's Supplemental Authorities, p.5. This argument necessarily ignores *Aetna Life Insurance Co. v. LaVoie*, 106 S.Ct. 1580, 1589 (1986), where then-Chief Justice Burger, joined by Justices White, Powell, Rehnquist, and O'Connor, took note of the insurer's Eighth Amendment and Due Process challenges and said: "These arguments raise important issues which, in an appropriate setting, must be resolved." It also overlooks the fact that Justice Stevens did not participate in *Aetna*, *Bankers Life*, or *Downey*, given the participation in those cases of Gibson, Dunn, & Crutcher, where Justice Stevens's nephew is employed; that Justice Kennedy, who did not participate in either *Aetna* or *Bankers Life*, joined Justice O'Connor and dissented from the denial of certiorari in *Downey*; and, finally, that Justice O'Connor, joined by Justice Scalia, wrote separately in *Bankers Life* to emphasize that, had the issue been properly preserved, the Due Process clause of the Fourteenth Amendment likely would have invalidated the underlying punitive damage award. Far more consistent with *Aetna*, *Downey*, and *Bankers Life* than the appellant's wishful characterization of them is the conclusion that the Supreme Court has a deep and abiding concern with the constitutionality of punitive damages as they are now being assessed and imposed. Having expressed that concern, the Court now is looking to the States to devise means to cure the wrong. That is what the court said, as opposed to what appellant wishes it had said, in *Bankers Life*:

> Our review of appellant's claim now would short-circuit a number of less intrusive, and possibly more appropriate, resolutions: the Mississippi State Legislature might choose to enact legislation addressing punitive damage awards for bad-

> faith refusal to pay insurance claims; failing that, the Mississippi state courts may choose to resolve the issue by relying on the state constitution or on some other adequate and independent federal ground; and failing that, the Mississippi Supreme Court will have its opportunity to decide the question of federal law in the first instance, while any ultimate review of the questions that we might undertake will gain the benefit of a well-developed record and a reasoned opinion on the merits. We think it unwise to foreclose these possibilities, and therefore decline to address appellant's challenges to the size of the punitive damage award.

108 S.Ct. at 1651.

CONCLUSION

Combined is only one of many litigants caught in and trying to make sense of a system of punishment where guilt and penalty are "wholly subjective" and "there are no objective standards" that apply. *Nevada Cement Co. v. Lemler*, 89 Nev. 447, 452, 514 P.2d 1180, 1183 (1983). On May 13, 1988, a Washoe County jury returned a $22,500,000 punitive damage verdict against an insurer. *Hires v. Republic Insurance Co.*, Case No. 87-2917. Three months earlier, a $9,500,000 verdict, including $3,500,000 in punitive damages, was returned by another Washoe County jury against an out-of-state contractor. *Gunn v. Seeno*, Case Nos. 85-4209 and 85-9970; *see also United Fire Insurance Co. v. McClelland*, Case No. 18705, now pending before this Court. These verdicts and the verdict in this case are symptomatic of a system gone out of control.

Combined regrets the need to file points of order. This appeal is too important, both to it and other litigants, to let the misstatements of fact and misapprehensions of law

that appear in Appellant's Supplemental Authorities pass unnoticed and without correction.

Dated this 11th day of July, 1988.
Respectfully submitted,

LIONEL SAWYER & COLLINS

By /s/ M. Kristina Pickering
M. Kristina Pickering
1100 Valley Bank Plaza
50 West Liberty Street
Reno, Nevada 89501

Attorneys for Respondent
Combined Insurance
Company of America

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No. 17625

THOMAS AINSWORTH,

Appellant,

vs.

COMBINED INSURANCE COMPANY OF AMERICA,

Respondent.

PETITION FOR REHEARING

INTRODUCTION: THE REASONS FOR REHEARING

Combined acknowledges that the substantial constitutional and other legal positions advocated in good faith by it have been "deemed to be totally without merit" by the Court. Slip Opinion at 10. The company is also mindful of NRAP 40 and *Flangas v. Herrmann*, 100 Nev. 149, 679 P.2d 246 (1986), which advise that a petition for rehearing may not reargue legal matters already presented to the Court. Nevertheless, the Court's opinion in this appeal assumes material facts that are not found in the record and fails to account for the regulatory environment in which Combined did business and issued its policy to Mr. Ainsworth. For these reasons the Court's analysis of the legal issues presented is substantively flawed. The opinion should not be promulgated as the considered law of this State by which citizens subject to it—including insurers

such as Combined--are to be governed without a thorough reconsideration of the precedent the opinion establishes.

This petition also raises the significant question of the desirability of handing the plaintiff and his attorneys a $6,000,000 windfall when there is reason to believe that at least one of the attorneys who will share in this recovery participated in creating the facts he later argued to the jury and the Court as justification for punishing Combined. (The astonishing motion filed last week by plaintiff's attorneys, in which they request *a single justice* of the Court to alter the Court's opinion on a substantive point of law, is treated in a separate response.) But the motion and the participation of Peter Chase Neumann, in particular, in communicating with Combined through his clients in advance of suit being filed, without disclosing his participation or purpose in doing so, should not go without full inquiry and evaluation before giving him several million dollars at the expense of Combined's thousands of policyholders.

Combined requests that this petition be submitted to the whole Court, with leave to brief the questions treated here more extensively on request of any member of the Court. The issues and policy questions raised by this petition are socially and legally important.

* * *

5. The Amount of the Damages Are Excessive.

The Court's opinion concludes that "an assessment of .04% of the respondent's *total assets* is not unwarranted under the circumstances of this case . . ., does not *shock our judicial conscience*, and . . . is not clearly excessive." Slip Opinion, p.10 (emphasis added). An insurer's "total assets" comprise for the most part policyholder reserves which, under state law, are held in trust to meet claims. To assess punitive damages based on policyholder reserves does not make sense. It is like assessing punitive damages

against a bank based on total deposits, as if the depositors' money were the bank's.[17]

The Court's opinion cites but is irreconcilably inconsistent with *Ace Truck & Equipment Rentals v. Kahn*, 103 Nev. Adv. Op. 107, 746 P.2d 132 (1987). *Ace Truck* rejected the old "financial annihilation" test because "[o]bviously, a very wealthy defendant could be the subject of an unreasonable and impermissibly excessive punitive award which represented an amount far below the point of financial annihilation." *Id.* at 135. It also rejected the "shock the conscience rule" because "[n]o effort has ever been made to define the judicial conscience or to describe how or under what circumstances it might be shocked." *Id.* Both discarded standards are revived, however, to uphold the award against Combined here.

The law governing the award of punitive damages in this State has proved as standardless and unpredictable after *Ace Truck* as it was before. *See Nevada Cement Co. v. Lemler*, 89 Nev. 447, 452, 514 P.2d 1180, 1183 (1973) ("the assessing of punitive damages is wholly subjective. There are no objective standards. . . ."). Justice Thompson seems to have had this case in mind when he wrote:

> One cannot avoid thinking that the general rules offered to explain the reviewing court's decision are tailored to fit its feeling about the particular case before it. If that court does not approve the verdict it will state that the jury was motivated by passion or prejudice or that a "reasonable

[17] The award in this case represents more than 400% of the total revenues Combined derived from its operations in Nevada in 1986. As a matter of policy, it may be questioned whether Combined's policyholders in other states which are working to impose meaningful limits on runaway punitive damage verdicts should subsidize those in Nevada, which permits them to be imposed on a mere "preponderance of the evidence" and gives no articulable standards to forewarn what acts will or will not trigger their imposition or determine their amount.

> relationship" between the punitive and compensatory awards does not exist or that the amount of the award is "enormous." On the other hand, in affirming the award may rely upon the converse of the reasons just mentioned, or upon a strong presumption in favor of the verdict as confirmed by the trial judge in refusing a new trial or some other equally plausible statement.

Miller v. Schnitzer, 78 Nev. 301, 308-09, 371 P.2d 824, 829 (1962).

CONCLUSION

This case presented the Court with the opportunity to lay down meaningful standards in this increasingly troublesome and unpredictable area of Nevada law. Combined's substantive and constitutional arguments have been rejected "as totally without merit," even though they were fully and extensively briefed by both sides, not just by Combined. *See* Appellant's Reply Brief, pp. 20-23. Combined's disappointment in the inhospitable reception it received in this appeal does not diminish its respect for NRAP 40 and the *Hermann* decision. Without rearguing the legal points already raised and decided against it, there are nevertheless serious and substantial reasons for this Court to accept this case on rehearing.

Combined has been deemed worthy of extraordinary punishment by this Court. Before that sentence is carried out, Combined implores each member of it to examine at least the claims file and the law cited in this petition. Indulging inferences, resolving evidentiary conflicts favorably to the party who won at trial, and construing ambiguities in insurance policies to not make up for the mistakes the Court's opinion makes in the record facts and the complete absence in the record of any evidence of intent to harm or injure Thomas Ainsworth. Substantial justice has not been done in this case.

Combined respectfully requests rehearing.

Dated this 14th day of November, 1988.

Respectfully submitted,

STEVE MORRIS
M. KRISTINA PICKERING
LIONEL SAWYER & COLLINS

By /s/ Steve Morris
1100 Valley Bank Plaza
50 West Liberty Street
Reno, Nevada 89501

Attorneys for Respondent
Combined Insurance
Company of America

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No. 17625

THOMAS AINSWORTH,

Appellant,

vs.

COMBINED INSURANCE COMPANY OF AMERICA,

Respondent.

FILED

FEB 24 1989

CLERK OF SUPREME COURT
By /s/ Sharon Page
DEPUTY CLERK

RESPONSE OF E. M. GUNDERSON TO PURPORTED "MOTIONS" BELATEDLY FILED BY RESPONDENT

I PREFATORY COMMENT

Counsel for appellant Ainsworth have already quite adequately repelled most, if not all, of the unsubstantiated and ludicrous assertions tendered by the losing lawyer in the fugitive documents belatedly filed in this court, which have been entitled "motion."[1] Accordingly, the undersigned is reluctant to burden this court with a detailed

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[1] Throughout this response, the undersigned will use the term "losing lawyer" and "loser" to refer to the individual who represented respondent Combined Insurance Company on appeal. When constrained to refer to the law firm which employs "losing lawyer," the undersigned will use the term "Lionel firm." The firm's senior member, Samuel S. Lionel, the undersigned's former partner, will be referred to as "Mr. Lionel."

reexamination of the losing lawyer's misrepresentations and distortions. Furthermore, the undersigned is confident that, even without the assistance provided by prevailing counsel, this court would be quite aware of how flailing and frivolous the central contentions now tendered by the loser in fact are. The loser's attempt to take refuge from a unanimous decision of this court, by attacking a single departed member, would actually be amusing if it were not so pathetically ineffectual!

Nonetheless, the undersigned feels constrained to comment briefly on the absurd *ad hominem* attacks that have been leveled against the undersigned and his wife. If the frivolous accusations were not denied, citizens who are not familiar with the legal system might otherwise be inclined to the accept losing lawyer's flailing assaults as true simply because they have been so blatantly tendered. Also, the undersigned wishes to make clear that he is prepared to answer any questions this court may have concerning his behavior. In the event this hastily drafted response leaves the court with any significant question unanswered, then the undersigned will be pleased to assemble any additional information that the court may desire.

II WHAT IS THE HISTORY OF COMBINED INSURANCE COMPANY OF AMERICA?

The undersigned had not yet read Andrew Tobias' startling national bestseller, *The Invisible Bankers*, when this court decided the instant case. Thus, the undersigned was not then fully aware of the dubious history of Combined Insurance Company of America and of its founder, W. Clement Stone. If the jury in the *Ainsworth* case had been more fully advised as to the unsavory history of the respondent company, and its founder. at the time the verdict in this case was entered, the jury might well have delivered an even larger punitive award than it did. According to Mr. Tobias' research,

> Sixty years ago in Chicago, W. Clement Stone began selling low-priced policies that covered things like "loss of a leg while riding on a train, boat or aeroplane," as one writer put it. You would be amazed how few people lose their legs while on a train, boat or aeroplane. Now Stone is a conservative philanthropist and professional positive thinker (co-author of such pep-tomes as *Success through a Positive Mental Attitude* and *The Success System That Never Fails*). His initial efforts selling accident insurance door-to-door have grown to be the wildly profitable Combined Insurance Company of America. Not once in the last 28 years has Combined failed to increase its dividend.

A. Tobias, *The Invisible Bankers* 54 (Washington Square Press 1982).

In Tobias' revealing book, the author goes on to comment on how astonishing is the disparity between the poor value of policies issued by respondent Combined, as opposed to the value of policies issued by other companies. Still, as Tobias goes on to state:

> W. Clement Stone never doubted the value of his products. No sir! He trained his legions to rise every morning chanting—"I feel happy, I feel healthy, I feel terrific"—and to go out selling their "Little Giant" accident policies with a Positive Mental Attitude. It is the sort of approach that leaves little room for soul searching or analysis.

Id. at 65.

From the actions of losing lawyer, it is easy to believe that the good Mr. Stone has inculcated such socially insensitive attitudes, not just into his sales force, but into the loser. Author Tobias goes on to advise that, by 1980,

W. Clement Stone and Combined had 3,000 employees peddling their dubious insurance products to the public. Tobias advises that, among other acts of conspicuous consumption, W. Clement Stone was Richard Nixon's biggest financial backer. From prior reading, the court may recall that by Mr. Stone's political excesses in regard to Nixonian politics—to which Stone contributed many, many millions—Stone triggered extensive media publicity, political outcry and demands for election reform. It is indeed ironic that Mr. Stone's company should now be seeking to avoid its liability to one of Combined's policyholders, through the losing lawyer's frivolous assertions that Combined has been politically victimized.

Incidentally, in regard to victimization, this is what Mr. Tobias tells about the provisions of one of the mainstay policies issued by W. Clement Stone and Combined Insurance Company of America:

> Here is what the Little Giant accident policy—mainstay and motive force of the company even throughout the 1960s (during which decade Combined's premiums quadrupled)—offered. For a mere $3 every six months you could count on:
>
> * TWO THOUSAND DOLLARS ($2,000) if killed or doubly dismembered while riding on a "surface or elevated railroad, subway car, streetcar or passenger boat," or while riding in an elevator or on a scheduled airline.
>
> * FIVE HUNDRED DOLLARS ($500) if, while on one of these public conveyances, you lost just one hand or one foot. (We all know people, I think, who, rushing for a closing elevator door, have thrust out, and had chopped off, a hand or a foot).
>
> * TWO HUNDRED DOLLARS ($200) if you merely lost an eye.

* FIVE HUNDRED DOLLARS ($500) if you were killed in or by an "automobile, bus, trolley-bus, taxicab or truck" or "at the hands of a burglar, highwayman or robber when robbing the Insured" or "by drowning" or "while within any burning building," provided you didn't rush in after the fire started to save someone.

* FIFTEEN DOLLARS ($15) a week up to a maximum of $225 if through one of the accidents described above you were not killed or dismembered, but were "continuously, necessarily and wholly" disabled from "performing each and every duty pertaining to [your] usual business or occupation." PLUS! Up to $4 a day in hospital expenses (not to exceed $56).

For policyholders under 14 or over 70, the premium was the same, but all the benefits were cut in half.

No wonder they called it the Little Giant! And no wonder thousands of salesmen have over the years been able to sell hundreds of millions of dollars worth of this policy!

The policy, retired from service in 1972, did not include any sort of statement as to the odds of this bet, but if it had, the disclosure statement, according to calculations based on accident statistics from the period, would have looked about as follows:

It is Expected That
APPROXIMATELY 10 CENTS
Of Your Premium Dollar
Will be Used To Pay Claims.
The Remainder, Plus the Interest
We Earn on Your Money,
Is Used to Cover Expenses,

Overhead and Profit.

Id. at 71-73.

Query: Is it not rather ironic that W. Clement Stone and respondent Combined—who Mr. Tobias reports built their fortunes on 60 years of nondisclosure to their poor, ill-advised, disadvantaged policyholders—now claim to be the victims of nondisclosure by the undersigned, in order to delay and frustrate one of the policyholders whose rights they sought to defeat?

III GENERAL OBSERVATIONS CONCERNING THE SPECIFIC CASE AT HAND

Before proceeding to discuss the specific allegations now belatedly being tendered by the losing lawyer, it may be well to recall the indisputable history of this case. Salient aspects of the facts are:

(1) The victimized policyholder in this case, Mr, Ainsworth, was willfully and egregiously injured by respondent Combined, at a time when Ainsworth—a decent and socially contributing Nevada citizen—was stricken, vulnerable and helpless. Based on the undisputed record, it almost seems impossible for any person to review the history of how Combined Insurance Company treated its vulnerable policyholders without alarm for the insensitive practices of Combined Insurance Company. Contrary to the suggestions of the losing lawyer, any negative attitude the undersigned might harbor toward the behavior of Combined cannot be characterized as "hostility," either toward the loser or toward his client. It would be simply a legitimate, objective assessment of the record because, without any serious dispute, that record shows bad faith and oppressive conduct toward the Ainsworths, of the most egregious character.

(2) It is also absolutely clear from the record that trial counsel for Combined Insurance Company of America was ineffective in presenting any tenable defense in regard to this misconduct. If Combined Insurance Company in fact had any defense, it was not coherently presented so far as the undersigned could ascertain from the record.

(3) It also strongly appears from any close reading of the record on appeal that the losing lawyer proceeded in the Supreme Court in a manner even more ineffectual than had unsuccessful trial counsel. In the Supreme Court of Nevada, the briefing and oral argument were as grossly ineffective as anything the undersigned ever observed in a major case during his tenure on the Supreme Court of Nevada. If the losing lawyer believes he presented any valid argument on appeal, neither the undersigned nor apparently any member of this court could discern it. What the loser now apparently interprets as personal discourtesy and "hostility" toward himself was, in fact, annoyance and frustration that no serious contentions were being coherently presented by the loser who, instead, seemed to the undersigned not really to be doing more than posturing as an advocate. The undersigned submits that a review of the tape recording of the oral argument will reveal that the other members of this court were as unimpressed with the performance of the loser as was the undersigned.

(4) As the members of the court who were present will recall, after this court recessed for conference following oral argument, the unanimous and unequivocal consensus then reached was that the jury verdict was supported and must be reinstated and approved in toto. As reflected by the affidavit prepared by this court's supervising staff attorney, Michael Wall, the undersigned did not lead the discussion at conference but allowed others on the court to speak first. It was

very apparent that no other justice viewed the loser's performance with any greater approval than did the undersigned, and the undersigned joined in the clear and unanimous court consensus. Then because the case had been assigned to the undersigned pursuant to the court's random rotational system, the undersigned thereafter prepared an opinion in strict conformity with the court's unanimous consensus. In doing so, the undersigned's further review of the record confirmed both the court's unanimous consensus that the jury's verdict was amply supported, and also confirmed initial impressions that trial counsel and later the loser, both had been totally ineffective to present issues impeaching the verdict.

(5) The undersigned is aware that, after he prepared the draft opinion in accord with the court's consensus, other members of the court later independently checked the record and confirmed their initial impressions before endorsing the opinion prepared by the undersigned. For example, as the court will recall, after the draft opinion was circulated, consideration of it was passed at conference so that certain other Justices could themselves again independently review the record. One Justice specifically advised that in addition to reviewing it himself, he had also caused the draft to be reviewed by other court personnel, because of certain issues he thought would have been possible for the loser to have raised. However, in each case, the staff person reportedly confirmed the Justice's own sense that the loser had failed to place the possible issue coherently before the court.

(6) Appellant's counsel, Peter Chase Neumann, has pointed out, in his responses to the loser's motions, various particulars in which the loser failed to present certain potential issues for this court's consideration. The undersigned fully agrees with these observations, and recalls to the court that such omissions of the

loser were of some concern at the time this case was initially considered. However, as the court knows, even if the loser does not, in an adversary legal system an appellate court commonly feels confined to treat only issues legitimately and coherently put before it by counsel. Otherwise, there is the prospect of judges becoming advocates on behalf of the derelict counsel, and deciding a case without the innocent counsel having an opportunity to be heard.

III FACTS CONCERNING THE BELATED CLAIM THAT THE UNDERSIGNED HAS SHOWN "HOSTILITY" TOWARD THE LOSING LAWYER

One of the most bizarre and unfounded notions now being suggested to impeach this court's unanimous decision is that—for some undefined reason, which losing lawyer totally fails to document—the undersigned supposedly has reflected hostility toward the loser personally. Of course, this is sheer nonsense, not merely (1) because the loser's claim stands unsupported, (2) because the claim is manifestly a belated afterthought, and (3) because the claim is palpably not true, but also (4) because it is absurd to suggest that the undersigned, out of "hostility" for the loser, would arbitrarily vote against clients of the undersigned's former partner and longtime friend, Samuel S. Lionel.

The only "evidence" cited by losing counsel in support of said loser's claim that he is the victim of personal "hostility" is his gratuitous interpretation of the undersigned's remarks during oral argument. Admittedly, based on the record of Combined's conduct toward its insured, Ainsworth, the undersigned had adverse impressions of the way Combined had treated its vulnerable policyholder. Admittedly, the undersigned tended to feel that Combined's behavior supported the jury's adverse determination that Combined was guilty of bad faith and oppression toward this helpless citizen. Of course, the undersigned cannot speak for the loser; still, the undersigned has met very

few other people, including judges, who respond with approval toward behavior that involves bad faith, breach of trust, and oppression of vulnerable persons who are dependent upon the wrongdoer. It may be that the losing lawyer sees nothing seriously wrong with his client's behavior, and therefore feels such "hostility" was revealed in the undersigned's questions. Still, it is simply frivolous to suggest that a judgment can be impeached because a lawyer, after the fact, interprets tough questioning as personal hostility.

The truth is that, as the record reflects, at oral argument, other members of the court showed similar aversion to the conduct of Combined—and were as totally unimpressed by the ineffectual performance of the losing lawyer—as was the case with undersigned. This is the simple, unvarnished truth as the undersigned sees it. And—as difficult as it may be for the loser to bear the facts regarding his unimpressive performance—his refusal to recognize this court's attitude simply reveals how very little the loser ever understood his case.

The undersigned felt that the loser did a remarkably bad job at oral argument, viewed from the perspective of effective appellate advocacy. He really did not understand his case at all. In regard to the undersigned's attitude toward the losing lawyer personally, however, the undersigned truthfully can say that whatever negative impressions the undersigned might have regarding the loser's abilities have been quite reluctantly arrived at from assessing the loser's work product and performance in this court. At a superficial level, the loser verbalizes well, but his comments often lack substance and depth and do not reach points that are significant to the Justices. To the undersigned's disappointment, the undersigned sometimes has reached the conclusion that the losing lawyer makes statements about legal records and legal authorities that later do not prove to be reliable. Whether the loser has been consciously untruthful in these regards, the under-

signed will not endeavor to judge. However, quite against the undersigned's predisposition, the actions of said loser have, over time, seemed to parallel the loser's behavior in the instant case, and have caused the loser to forfeit credibility as an advocate. Thus, again, the undersigned believes these impressions do not constitute a bias upon which any justiciable claim of "hostility" can be predicated. They simply reflect the reality that each attorney leaves court after every appearance either with enhanced or with lessened credibility—solely dependent on how he has comported himself before the court.

Now, until the undersigned had the opportunity to observe the loser's work closely on various occasions, the undersigned assumed that he possessed ability and integrity, simply because counsel was appearing as an associate of Samuel S. Lionel. The undersigned therefore went out of his way to be kind to the loser, and to assist him. The undersigned is one of only a handful of elected Nevada members of the American Law Institute. Some years back, after the loser expressed a desire to achieve membership, the undersigned agreed to and did act as the loser's proposer and sponsor for membership in the ALI. In furtherance of loser's aspiration for this credential, the undersigned not only worked to prepare the necessary sponsorship papers, but also solicited Morton Galane, of Las Vegas, to act as seconding proposer or co-sponsor. In acting as aforesaid, the undersigned was in a large degree influenced by the fact that the losing lawyer was associated with Samuel S. Lionel, the senior partner in the firm of Lionel, Sawyer & Collins, who are attorneys of record for Combined in this matter.

Even though the undersigned is an elected member of the American Law Institute, the undersigned actually is not overly impressed with the value of the organization. The undersigned is inclined to accept the assessment of the country's best recognized contemporary legal historian, Lawrence Friedman, as set forth in his *History of Amer-*

ican Law, to the effect that the American Law Institute is fundamentally worthless as an instrument of law reform. Still, the undersigned now regrets not having examined court files on the loser before recommending him or assisting him to obtain a credential that might cause a client to rely unduly upon him.

The fact is that several years ago—after observing a previous lackluster performance by the losing lawyer—the undersigned was sufficiently curious to review the loser's bar admission files. What the undersigned discovered was that the first time the loser sat for the bar examination, he failed it. Indeed, he failed more than 40% of the subjects covered in the examination. At the time, the loser was working as a law clerk for an attorney who shortly thereafter became rather widely renowned for shameful behavior. *See* Ponderosa Timber & Clearing v. Emrich, 86 Nev. 625, 472 P.2d 358 (1970) (see particularly, Mowbray, J. dissenting). Someone, quite inferably the loser, then caused his aforesaid employer to write an ex parte letter to the Nevada Supreme Court, evidently seeking to influence the court to admit the loser to law practice—notwithstanding the fact of his failure. The undersigned is gratified to be able to say that this court peremptorily rebuffed this illicit overture in which the loser appeared to be clearly implicated. Hence, the loser was forced to study again for the bar examination—and, while he later "squeaked by," the fact is he almost failed once again. In view of these facts, the undersigned admittedly somewhat regrets doing anything to help the loser accumulate credentials to obscure his lack of real capacity as a scholar and advocate.

Nonetheless, the undersigned in intervening years has maintained a cordial relationship with the loser. For example, sometime after the instant case was argued, the undersigned by chance met the loser and his co-counsel, Ms. Pickering, in a Las Vegas restaurant. They invited the undersigned to sit with them, and the interlude was

warm and friendly, with absolutely no hint that either of them felt aggrieved by the manner in which the undersigned had comported himself during argument in the *Ainsworth* case.

It should be noted that, notwithstanding the undersigned's inclination to view the loser as less than a talent of first magnitude, the undersigned in late November 1987 recommended that this court employ loser's wife, Karen, as Nevada's state deputy court administrator. Loser's wife was therefore elevated to a position of trust and responsibility, at a very good salary—because of the undersigned.

A Las Vegas newspaper recently quoted the loser as trying to put some distance between himself and his aforesaid wife, by stating that he separated from her several years ago. Very loosely stated, this may be the truth, since in 1984 the loser's wife began attending law school in Los Angeles. Naturally, the undersigned has no way of knowing the intimate details of the loser's life with his wife. All the undersigned knows is that these individuals have maintained residences both in Las Vegas and in Reno—in both of which cities loser's law firm maintains offices, and in both of which he practices. Just when loser decided to divorce the wife who supported him through law school—and to pursue other interests—is unknown to the undersigned. Since loser has hidden the details of their separation, by obtaining a court order "sealing" the file concerning his divorce, all that now can be ascertained is that on October 26, 1987, sealed and secret divorce proceedings were instituted. That was months after the *Ainsworth* case was argued. Then, on June 9, 1988, in sealed and secret proceedings, the loser was accorded his secret divorce decree from his wife—while the *Ainsworth* case was under submission and being deliberated by the Nevada Supreme Court.

In summary, the facts are that loser's wife first came to work as a legal extern for Justice Charles Springer in

the spring of 1986. She became Justice Springer's law clerk on January 6, 1987, several months before the *Ainsworth* case was argued on June 10, 1987—hence, loser's wife had easy access to confidential court files concerning the *Ainsworth* case. Loser's wife continued to work for the court and, on November 30, 1987, she was elevated to the trusted position of deputy state court administrator—while the *Ainsworth* case was under deliberation. Loser's wife worked under the direct authority of the undersigned, as administrative head of the Nevada court system, during all of the remaining time that the *Ainsworth* case was under deliberation. In the time that the *Ainsworth* case was under the court's consideration, loser's wife received some $89,685 in salary and other benefits, as a direct result of Justice Springer and the undersigned employing her in the aforementioned capacities. She is still employed as state deputy court administrator, having received several substantial raises, as a result of actions by Justice Springer and the undersigned—all while the *Ainsworth* case was pending before the court. There is little question that had she been of bad character—which the undersigned is confident she is not—loser's wife would have been in a position to purloin and deliver to loser copies of the court's confidential internal memoranda concerning the case, including its "bench memo," which was prepared before oral argument. This, of course, arguably would have placed the loser in a position of substantial advantage over counsel for the Ainsworths, who did not have access to such memo. Arguably, too, loser's wife could have influenced other staff members working directly on the case—as well as influencing Justice Springer, the undersigned, and other members of the court.

Now, of course, the undersigned does not contend that loser's wife is of bad character, or that any type of impropriety occurred in her relationships to the court. However, it is understandable why loser has attempted to put some distance between him and his spouse, when con-

fronted by a Law Vegas newspaper about the relationship. The relationship, with all the sinister implications which could have been read into it by Mr. Neumann and Mr. Bradley—if they were of loser's character, and had themselves lost the case—gives a classic illustration of the reality that Nevada is a small and intimate state. Virtually every prominent member of the business and legal community in Nevada knows most of the others, and they come into a variety of close associations.

Certainly, if Mr. Neumann and Mr. Bradley had lost and had been of the same character as the instant losing lawyer, they would have had much more upon which to generate a phony and distorted claim of "appearance of impropriety" than the loser now does. Can the court imagine what an attorney of the loser's character could be expected to speculate about what might have gone on if Mr. Neumann's wife had been employed by the Nevada Supreme Court in such sensitive capacities? Oh, how a disappointed counsel like the loser could beat the table and his chest, exhorting about the impropriety of rewarding Mr. Neumann's wife with as many substantial raises and economic benefits—flowing directly into the coffers of the marital community! Can the court imagine how readily adverse counsel of the loser's character, in such circumstances, would have contemptuously dismissed any suggestion that there was no impropriety because Mr. Neumann and his wife were "separated"? From unscrupulous counsel, would we not hear much speculation based on the fact that the details of Mr. Neumann's "separation" and marital dealings had been kept secret by the unusual order obtained in the sealed divorce proceedings? Would we not hear a counsel of the loser's character speculate that those sealed proceedings were not even started until after the wife had many opportunities to commit corrupt acts? Would this court not hear many other frivolous claims impugning the character of the wife, as the character of the undersigned's wife has been impugned? The under-

signed understands losing counsel is still living in the marital home in Las Vegas, which was recently received by his wife in the divorce settlement, and that they have other on-going contacts. "How about these matters?," an unscrupulous losing adversary might have cried!

In addition to illustrating how sinister innocent relationships can be made to appear by unprincipled persons, another point that must be recognized is how the undersigned's role in hiring the loser's wife tends to negate the foolish, unfounded claim that the undersigned has been "hostile" to the loser. The undersigned has no knowledge about what the loser's intentions may have been to divorce the wife who worked as a school teacher to pay his way through law school. While having no great belief in loser's legal ability, but having little reason to believe loser to be of grossly bad character, the undersigned simply provided loser's wife with a high profile position, at a very good salary, in confidence that she would not abuse her trust to the advantage of the loser or anyone else. Regardless of any plans the loser may then have had to divest himself of her, it is the quality of the undersigned's actions that are significant, and it is submitted that the undersigned's actions repel any claim of hostility toward counsel.

IV THE LOSER'S STATUS AS AN ATTORNEY FOR RESPONDENT

Another ridiculous aspect of the loser's unsupported suggestion—to the effect that the undersigned might rule against Combined Insurance Company out of personal "hostility" to him—is the fact that the undersigned has never understood that the losing lawyer is anything more consequential than an employee at will of the Lionel firm. Perhaps the loser's standing in the firm has improved of late. However, based on the information the undersigned has received in the past—and which the undersigned has always assumed to be true—the only two persons who hold any meaningful interest or control in the law firm are

Samuel S. Lionel and Grant Sawyer. At one time, for example, Mr. Lionel explicitly told the undersigned: "This is my firm, mine and Grant's." The clear implication was that no one else had any interest or say in the firm's affairs, and other statements have confirmed this in the undersigned's mind.

Samuel S. Lionel is one of the oldest friends the undersigned has in the world, and, so far as the undersigned is concerned, by many measurements has been one of his best friends—from the undersigned's perspective, at least. Mr. Lionel raised substantial monies for the undersigned in his 1982 reelection campaign. While the undersigned's campaign organization was very loose, the undersigned would have considered Mr. Lionel in effect to have been a member of the undersigned's finance committee. The undersigned therefore has considered Mr. Lionel to be not only a good friend, but a political supporter valued at least as greatly as Mr. Neumann, and certainly far more than anyone in the Bradley-Drendel firm. Therefore, if losing counsel is really so crass as to believe that the undersigned's vote in the *Ainsworth* case was made by referring back to the matter of who supported the undersigned for election six years before, counsel has overlooked the reality that the undersigned is as grateful to Mr. Lionel for his support as undersigned is to anyone in the world.

Furthermore, Mr. Lionel not only has been a political supporter, but is a former law partner of the undersigned with whom the undersigned parted on very amiable terms. For years after the undersigned left the partnership of Lionel & Gunderson, Mr. Lionel and the undersigned in effect held a reunion by attending together the "Bosses' Night" dinner dance sponsored by the Las Vegas Legal Secretaries' club. This practice continued even after the undersigned joined the Nevada Supreme Court, and on at least one of these occasions—and perhaps two—the undersigned stayed overnight in Mr. Lionel's home. On other occasions, the undersigned has been a guest in Mr. Lionel's

home, and numerous times over the years, the undersigned and Mr. Lionel have continued to have lunch together. Other examples could be cited to document the affection and the regard the undersigned has for Mr. Lionel, both as a lawyer and as a human being. Mr. Lionel has embraced far different social and professional goals from the undersigned; however, the undersigned has considered Mr. Lionel a superb lawyer, a very good friend, and a worthwhile human being. The undersigned therefore finds it astounding that an underling in Mr. Lionel's office should now make the bizarre claim that the undersigned would corruptly injure Mr. Lionel in order to favor someone else.

Thus, if respondent Combined Insurance Company had won the instant appeal, rather than the Ainsworths—and if the Ainsworths' attorneys had been disposed to generate the same kinds of false claims of impropriety as losing counsel has—Mr. Neumann and Mr. Bradley would have at least as much to "muckrake" about concerning Mr. Lionel as the loser does in regard to Neumann, Bradley and Drendel.

V LOSING LAWYER'S CO-COUNSEL, KRISTINA PICKERING

Although the losing lawyer's performance in court has established him to be an ineffectual advocate, the undersigned always has been extremely impressed with the abilities of loser's co-counsel in this case, Ms. Kristina Pickering. The court will probably recall that said Ms. Pickering some time ago appeared on behalf of a husband in a divorce case that involved substantial property.[2] Although the undersigned felt Ms. Pickering was presenting

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[2] Hummel v. Hummel, Order Dismissing Appeal, Docket No. 16150 (filed April 9, 1986). In this case, Ms. Pickering, appearing for the Lionel firm, prevailed over the nationally known divorce counsel, Marvin Mitchelson. The undersigned is sure that in the *Hummel* case, Mr. Mitchelson was almost as annoyed by the undersigned's sharp questioning as is losing counsel in this case.

the better argument, it was clear from the questions posed to her by other court members that they were not attuned to her position. The undersigned, therefore, supported her position vigorously—which, perhaps, her adversary experienced as "hostility."

In any case, after the argument of the *Ainsworth* case—at which Ms. Pickering appeared with the loser—the undersigned received a very warm letter from Ms. Pickering. When the undersigned announced his intention not to run again for the Nevada Supreme Court, Ms. Pickering wrote a letter to the undersigned, a copy of which is annexed hereto as Exhibit "A". In response, the undersigned wrote Ms. Pickering a letter of praise and friendship, a copy of which is annexed hereto as Exhibit "B". Of course, it is possible that Ms. Pickering could claim that she was simply trying to "con" the undersigned—and that really, despite her letter, she believed the undersigned to be a hostile, harsh and intellectually corrupt judge. However, such arguments would have to fail as a legal matter. No counsel can be allowed to lead a judge to believe that he or she is satisfied to have the judge decide a matter, and then, after losing, complain that the judge did not realize counsel felt the judge should not sit. Neither losing counsel, his co-counsel, or the Lionel firm ever complained—either formally or informally—about the undersigned sitting in judgment of this case. Everything they ever did, including Ms. Pickering's letter, was of a nature designed to make a reasonable man believe they were satisfied with the undersigned's participation.

VI DESPITE THE FACT THAT ALL THREE OF THEM ARE FRIENDS, THE UNDERSIGNED HAS VOTED FOR—AS WELL AS AGAINST—MR. LIONEL'S FIRM, PETER CHASE NEUMANN, AND BRADLEY & DRENDEL

The court will recall that, although a member of the Bradley & Drendel law firm allowed his name to be used on campaign advertising to support the undersigned in

Washoe County, the next year undersigned nonetheless was a strong advocate against the firm retaining a very substantial personal injury judgment.[3]

Despite the undersigned's friendship for Peter Neumann, the undersigned also prepared the per curiam opinion in Mr. Neumann's famous "horse case."[4] That opinion slashed the damages allowed to Mr. Neumann's client—a fact that, according to hearsay reports which reached the undersigned, caused Mr. Neumann to gripe bitterly within the legal community, but which at least did not cause him to act the way the loser has been recently behaving. The undersigned also opposed Mr. Neumann in other cases, including the well known Sundowner case,[5] which was not only financially but emotionally important to Mr. Neumann.

So far as the Lionel firm is concerned, the undersigned has supported its position many times, and opposed its position many times. For example, the undersigned strongly supported the position of the Lionel firm in the "Redfield Coin Case," which was a case with the potential of great economic reward for the attorneys. Despite the fact that the partner in the Lionel firm who presented the case was an individual the undersigned considers to have had even less ability than does the losing lawyer here, the undersigned worked extremely hard to convince the court that the Lionel firm's client should prevail. The undersigned expended much effort preparing a proposed opinion to that effect, which the undersigned ultimately published as a dissent when the other members of this court voted contrary to the view of the undersigned.[6] In short, despite

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[3] Sierra Pac. Power Co. v. Rinehart, 99 Nev. 557, 665 P.2d 270 (1983).

[4] State v. Kallio, 92 Nev. 665, 557 P.2d 705 (1976).

[5] Davies v. Butler, 95 Nev. 763, 602 P.2d 605 (1979).

[6] A-Mark Coin Co. v. Estate of Redfield, 94 Nev. 495, 582 P.2d 359 (1976).

the support which the undersigned has received over the years from the various attorneys involved in this case, the undersigned has always voted his conscience when those attorneys have appeared before him. It cannot seriously be contended by objective persons that, on such a record, an appearance of impropriety now exists.

For better or worse, in the State of Nevada, the media has encouraged the public to place its voting support behind a system of contested elections, financed by campaign contributions, in which various attorneys become strongly involved in the choosing of judges. The Lionel firm has historically been one of the most active of these political participants—so much so that it frequently has been accused in the press of trying to corrupt the system. However, to the recollection of the undersigned, the Lionel firm has never warned its opponents concerning the support that it has given over the years to various judges. Until losing counsel and his "expert" appeared on the scene has anyone ever suggested there was a need to do so? Given how easy as it is to conjure up spurious claims of "appearance of impropriety" after a case is decided, then so long as we have an elective system, the task of avoiding the prospect that losing lawyers of bad character may raise such claims is next to impossible.[7]

It is the tradition of the legal profession that attorneys and judges maintain close relationships, but yet the judges are expected to sit and do their duty, without favor.

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[7] Incidentally, although the undersigned does not wish to depreciate the support of any supporter, any claim that the undersigned was deeply indebted to Mr. Neumann and Mr. Drendel—because their names were used in the disclaimer blurb of the undersigned's Washoe County advertising in 1982——can only be characterized as trivial.

The fact is the undersigned's 1982 election was what is often called a "cake-walk," in which the undersigned carried every county in the state. The undersigned compiled the highest plurality and popular vote in any statewide election—and, if the undersigned had not received a single Washoe County vote, would still have trounced his opponent!

VII CONTENTIONS ABOUT MR. NEUMANN'S ROLE IN A LONG-SETTLED CONSPIRACY CASE ARE RANK NONSENSE

In part, losing counsel has based his contentions about the undersigned's role in now long-settled conspiracy litigation upon the loser's rank speculation that the undersigned enlisted Mr. Neumann to serve as attorney in the case. Loser thus suggests the undersigned owed Neumann a favor because Neumann did the undersigned a favor by prosecuting the action. As has already been established by documents filed in this case, loser's assertion was a falsehood—one of many appearing in losing counsel's documents. In fact, another private attorney evidently sent the aggrieved client to Neumann, and Neumann took the case, won it, and made a large fee!

The losing lawyer also speculated that, while telling Mr. Neumann about evidence in the conspiracy case, the undersigned might also have discussed the Ainsworth case—which was not then even at issue. How incredibly frivolous and silly! Litigants losing to the Lionel firm might just as sensibly suggest that, long before while having lunch, the undersigned "could" have discussed their case with Mr. Lionel.[8]

As already appears of record, the undersigned, by virtue of his official position, not only became aware of evidence

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[8] It is true that the apparent criminal wrongdoer had not only received election support from the Lionel firm, but was supported in his wrongdoing by the losing lawyer, as a member of the State Bar's Board of Governors. And, incidentally, neither the apparent criminal wrongdoer not the Lionel firm ever saw fit to warn anybody about the support they had given to the apparent wrongdoer, on any of the occasions when the wrongdoer sat in judgment of their cases. Nor does the undersigned suggest that they should have done so. The undersigned does, however, suggest that it is rank nonsense to contend that because the undersigned let Mr. Neumann know the nature of the evidence favoring his client, the undersigned created an "appearance of impropriety" between the undersigned and Mr. Neumann.

of crimes against Mr. Neumann's client, but ultimately became official custodian of much evidence pursuant to order of the federal court. As this court will recall, dragged into the controversy by wrongful procedures employed by the defendant wrongdoer, the undersigned achieved a partial recovery of damages and expenditures thus imposed upon the undersigned. It is a strange thing, indeed, for losing lawyer to contend that, although the undersigned was adjudged entitled to be compensated because he had been dragged into litigation, and subjected to abuses in his official capacity, nonetheless the undersigned created an "appearance of impropriety" by the way he coped with the legal problems created by the loser's apparently felonious judicial friend.

VIII CONTENTIONS ABOUT LAURA FITZSIMMONS ARE ERRANT NONSENSE

From time to time, members of this court have been involved in litigation concerning matters relating to their official capacities. On many occasions, members of the court have been represented by Nevada's attorney general; however, simultaneously, the attorney general has continued to appear before this court in other litigation. No one has ever suggested that either the court, or the attorney general, should be disqualified in one piece of litigation because he or his staff is appearing for the court in another. This is because, obviously, the attorney general has been representing the court as an officer, serving a public need.

From time to time, when the attorney general has been disqualified, or the court for other reasons has felt it advisable, then either the court or an individual member has hired private counsel. On one such occasion, for example, the undersigned, as Chief Justice, hired the Lionel firm in regard to litigation which concerned the constitutionality of using lay judges as adjudicators. In that litigation, as a result of the undersigned choosing the Lionel firm, it

received a substantial fee, which was paid out of funds obtained through legislative appropriation.

When the undersigned, as Chief Justice, was forced to become involved in the aforesaid conspiracy litigation, the undersigned retained Laura FitzSimmons under very similar circumstances. The attorney general was disqualified, because his office had been gulled into representing the apparent criminal wrongdoer in other litigation before the federal. The federal courts ultimately came into possession of criminal evidence against the apparent wrongdoer, and then entrusted it to the undersigned *in custodia legis*. Basically, after the litigation was resolved in favor of Mr. Neumann's client, the district court was asked to sanction the wrongdoer and his attorney, and to compensate the undersigned for his injuries and for legal services, so the undersigned would not have to approach the legislature for funds with which to do so. Hence, Ms. FitzSimmons was in a position analogous to that of several other private attorneys, such as the Lionel firm, who have represented members of the court in their official capacities—all of whom, if the undersigned recalls correctly, nonetheless have continued to appear before this court.

Furthermore, as to the instant case, it should be noted that Ms. FitzSimmons never even appeared before the court herein while she was representing the undersigned in his official capacity. When she appeared later, she did not appear for a litigant, but for the Nevada Trial Lawyers Association, as a friend of the court. In short, she had no stake in any other proceeding, and indeed no personal stake in this one. Furthermore, she did not even come before us as a friend of the court until her representation of the undersigned had been completed. Then, when she came to court, the undersigned recalls she simply observed and did not speak. In summary, to suggest that Ms. FitzSimmons or the undersigned did something unethical because she was allowed to sign an "amicus" brief and to sit in court, has required the losing lawyer and his

ethics academic to engage in outrageous distortion and perversion of the paltry legal authority that they have cited.

IX THE FRIVOLOUS ALLEGATIONS CONCERNING LUPE GUNDERSON ARE BASED ON PATENT DISTORTION AND FALSEHOOD

The undersigned will not long belabor the spurious allegations concerning Lupe Gunderson. As counsel for the Ainsworths have already pointed out, respondent's counsel had both actual and constructive notice of Lupe Gunderson's transitory, and innocent business association with Peter Chase Neumann. The documents now on file herein show that the losing lawyer has engaged in either a reckless or an intentional falsehood when he untruthfully asserted that respondent's counsel never had notice of any kind that Lupe Gunderson was involved with Peavine, Inc. The losing lawyer also misstated the truth when he claimed that Lupe Gunderson had hidden her association with Peter Chase Neumann. The truth is that, among other things, public legal notice of that association was repeatedly published in the Reno newspapers. Several other facts cited to the court by Ainsworth's counsel show that respondent's counsel knew full well of the association.

The brief business association was over long before this case was even argued—much less decided. The undersigned hardly gave the Peavine venture a passing thought during his wife's brief abortive involvement with it, and it is now rank nonsense to suggest the undersigned should have later remembered it and revealed to respondent's counsel a matter about which they obviously knew more than the undersigned.

X THE LOSING LAWYER'S CONTENTION ABOUT THE NTLA'S TESTIMONIAL TO THE UNDERSIGNED CAN ONLY BE CHARACTERIZED AS DESPERATELY TRIVIAL.

As has been elsewhere pointed out by appellant Ainsworth's counsel, not only the undersigned—but many of

Nevada's finest trial judges—have been recognized by the Nevada Trial Lawyers. Yet, quite frivolously, the losing lawyer now asks this court to say that undersigned was unethical and thereby created an appearance of impropriety by accepting a recognition plaque from the NTLA: something which every member of this court has done, and which many fine trial judges like Jerry Carr Whitehead, J. Charles Thompson, Keith Hayes and several others have done also, without raising anyone's eyebrows!

Yet, the losing lawyer would have this court go even further and say (1) that accepting such a plaque is a violation on the part of a judge so serious as to preclude him from sitting; and (2) that such objection even can be made after gambling on the outcome by waiting until a judge has ruled adversely! The loser's belated contentions are frivolous beyond belief.

The loser also has sought to augment his basic trivial assertions by reporting unsworn hearsay from an informant he has failed to name! Even after the Ainsworth's lawyers submitted affidavits stating that persons who were present and listening did not hear the undersigned make the remark reported, the losing lawyer has failed to supply any documentation of his unsupported allegation.

In any case, the undersigned hereby advises the court that, although the undersigned praised the trial lawyers for their past dedication to justice, the undersigned did not make the remark alleged by the losing lawyer without support. If he actually has some anonymous informant who so claims, the informant or informants misunderstood what the undersigned meant to convey.

Also, so far as the undersigned is aware, the NTLA is not exclusively an organization for lawyers who represent only plaintiffs. For example, Neil Galatz, who has been extremely active and served in high elective positions of the NTLA and national trial lawyers' groups, does a substantial amount of malpractice defense work on behalf of

doctors, and has represented insurance companies in other contexts.

The losing lawyer's contentions on the NTLA are thus all shallow and unsubstantial in the extreme.

XI CONCLUSION

The undersigned fully agrees with the losing lawyer's observation to the effect that the American system of justice has been diminished by the way this case has been processed.

Combined Insurance Company is a corporation which has amassed a huge fortune which should, in the revered Roger Traynor's words, be deemed a "risk pool" held subject to a trust awaiting the need of distressed policyholders like the Ainsworths. Contrary to Combined's trust—as the jury found, in calculated bad—legal agents of Combined cynically stalled and manipulated the Ainsworths. They inferably played "cat and mouse" to pressure and oppress Mrs. Ainsworth, who was an untrained and unworldly woman struggling to extract the entitlement she and her helpless husband desperately needed.

Even after suit was filed, counsel for Combined continued the obfuscation and the dilatory tactics. One must wonder how much money Combined's trial and appellate counsel—through the billing practices common with insurance defense counsel—have extracted from the "risk pool" out of which the Ainsworths were entitled to be paid. In any case, it should be recalled again, it was the jury and not the undersigned—or any other judge—who were so offended by the practices of Combined and its counsel that the jury brought back a substantial verdict for punitive damages. From a review of the record, it could be argued that an even larger verdict would not have been surprising and would have been warranted under the circumstances. Even before this appeal, the antics of Combined Insurance Company and its attorneys typified the practices which

mar this country's system of health risk management. The jury obviously believed so, and concluded that strong measures should be taken if other citizens were to be protected in the future.

Unfortunately, it appears that the intended message has still been lost upon Combined Insurance Company and its present representatives. Counsel still are engaging in obfuscation and delay, evidently to obscure the reality of their ineffective performance as advocates—to hide the reality of their ineptitude—and to create a justification for raiding the "risk pool" for further fees.

The undersigned suggests that what the court sees here is a classic example of how desperate lawyers can act when lackluster performance brings their efforts to a predictable denouement. Then, if such lawyers feel they can get away with it, they will attack the court and hope that others, especially their clients, credit their ploys.[9] Manifestly, the

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[9] Aside from the losing lawyer's motivations to obscure his inadequacy from officials of respondent Combined—and also to extract further fees while he is at it—two other improper motivations of his office are readily inferable. First, with some $6 million at stake, it seems the losing lawyer inferably is tendering his frivolous motions for the bad faith purpose of trying to keep the judgment herein from becoming final until the United States Supreme Court decides Browning-Ferris Industries v. Kelco Disposal, Inc. (No. 88-556, *cert. granted*, Dec. 5, 1988). If this is accomplished, then the loser could try to contend his client is entitled to the benefit of any new doctrine, which he failed to raise properly earlier in this case.

Second, as the court no doubt is aware, another lawyer in the office with whom the loser is associated recently emerged as a public spokesman in attempting to denigrate this court and, particularly, the undersigned. The undersigned notes that the potential for vindictive motivations on the part of the other person are manifest, because of the undersigned's efforts in two cases to hold him accountable for deliberately submitting a false affidavit in court, Eikelberger v. Tolott, 96 Nev. 525, 611 P.2d 1086 (1980), and for not only lying to a client, and prejudicing the clients rights, but also taking fees from the client without performing promised services. Selsnick v. Horton, 96 Nev. 944, 620 P.2d 1256 (1980). Under these circumstances, the present moti-

losing lawyer believes he can prevaricate with impunity, defame and insult at will.

It is respectfully submitted that the court should now summarily reject the frivolous motions so belatedly filed herein. It then should proceed to consider how best to deter disgraceful behavior of a similar type in the future.

/s/ E.M. Gunderson
E.M. Gunderson

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vations of this spokesman's sudden concern for "ethics" and "good government" clearly are suspect.

STATE OF NEVADA

COUNTY OF CLARK:

SS:

E.M. Gunderson, being first duly sworn on oath, deposes and says: that he is the person named in, and who executed the foregoing statement; that he has read the same and factual matters set forth herein are true of his own knowledge, except as to matters stated therein on information and belief, and as to those matters he believes the same to be true.

/s/ E.M. Gunderson
E.M. Gunderson

Subscribed and sworn to before me this 24th day of February, 1989.

/s/ Jeanne C. Richards
Deputy Clerk
Supreme Court of Nevada

[EXHIBITS DELETED]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No. 17625

THOMAS AINSWORTH,

Appellant,

vs.

COMBINED INSURANCE COMPANY OF AMERICA,

Respondent.

APPLICATION TO CHIEF JUSTICE YOUNG, OR IN HIS ABSENCE, THE ACTING CHIEF JUSTICE, FOR PERMISSION TO FILE A REPLY TO GUNDERSON/ NEUMANN/WALL FILINGS OF FEBRUARY 22 AND 24, 1989

Pursuant to the Court's February 24 and March 10, 1989 Orders, Combined Insurance Company of America and its counsel hereby apply to the Chief Justice for permission to respond in writing to the papers filed by Peter Chase Neumann, Senior Justice Gunderson, and Chief Staff Attorney Michael Wall on February 22 and 24, 1989. The Gunderson/Neumann papers contain statements that are not true and which bear on the merits on the rehearing/ disqualification matters now before the Court. These papers also contain admissions that establish beyond cavil both the timeliness and substantive sufficiency of Combined's pending motion to vacate the Court's October 26, 1988, decision and to rehear this appeal, without Justice Gunderson's participation or influence.

The issues Combined asks permission to address in detail are these:

1. Nevada Code of Judicial Conduct.

Neumann admits in his February 22 affidavit that Mrs. Gunderson paid nothing for the interest he gave her in Peavine, Inc. Neumann Affidavit, pp.3-4. That interest had a value of at least several thousand dollars and potentially far more. Neumann regularly appears as an attorney before the Court and did so at the time of the gift. *See, e.g., Jeep Corp. v. Murray*, 101 Nev. 640, 708 P.2d 297 (1985). Nevada has adopted the ABA Code of Judicial Conduct. The Code prohibits lawyers who regularly appear before judges from making gifts to the judges or their wives. Nev. Code Jud. Conduct Canon 5C(5) (c).[1] Although illegal, such a gift must be disclosed on the financial disclosure statements judges must file publicly with the Clerk of the Court. Nev. Code Jud. Conduct Canons 5C(5) (c) & 6C. Justice Gunderson's Canon 6C filings are among the evidence Combined asks permission to file. They do not say anything about Neumann, Peavine, Inc., or a gift from Neumann to Mrs. Gunderson.

2. Timeliness.

The Court's February 24 and March 10 orders give as a reason for cutting off further filings in the case the Court's concern with "the timeliness and propriety" of Combined's pending motions. How could Combined have known about Peavine and the Code violations it entailed when Neumann's illegal gift to Mrs. Gunderson was not disclosed, as it was required by law to be, on Justice

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[1] *See In re Corboy*, 528 N.E.2d 694, 700 (Ill. 1988) ("[i]f the nature of an attorney's practice is such that a matter in which he is involved is likely to be involved in a court proceeding, then that attorney [is] prohibited [by Canon 5C] from making a gift to any judge [or judge's family member residing with him] who sits on the court where the case may be heard—circuit, appellate or supreme"); *In re D'Angelo*, 533 N.E.2d 861 (Ill. 1988) (publication pending) (lawyer disbarred for giving sitting judges free rental car vouchers); *In re Lawrence*, 335 N.W.2d 456, 461-62 (Mich. 1983) (judge suspended for, among other things, accepting free legal services even on a minor matter).

Gunderson's Canon 6C disclosure statements? The affidavits of Alan Johnson and Julien G. Sourwine are additional evidence Combined asks permission to submit. These affidavits establish that Combined and its lawyers did not know anything about Peavine, Inc.—much less that it involved an illegal and unreported gift by Neumann to Justice Gunderson's wife—until shortly before Combined filed its February 16, 1989, Supplement. Had Combined known about Peavine earlier it would have moved immediately to disqualify Justice Gunderson. Peavine, Inc. and the other facts before the Court, taken as a whole as they must be, would have required Justice Gunderson's disqualification under Canon 3C(1) (a) of the Code. *See, e.g., Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980).

While Neumann's February 22 affidavit establishes Peavine, Inc. as a gift, Justice Gunderson's February 24 "Response" establishes he knew about the gift. No state or federal court known to Combined has had presented to it similar admitted violations of law and declined to consider them. They should not be unacknowledged here. *See* note 1, *supra; see also Liljeberg v. Health Services Acquisition Corp.*, 108 S.Ct. 2194, 2201-02 (1988) (vacating a final judgment on motion under Rule 60(b), where the basis for disqualifying the judge existed but was not revealed publicly until trial had concluded *and* the case had been affirmed on appeal); *Johnson v. Sturdivant*, 758 S.W.2d 415, 417 (Ark. 1988).

3. Actual Bias.

Judges who entertain bias for or against a party cannot sit in judgment of the party. Nev. Code Jud. Conduct Canon 3C(1) (a). Until now, Combined's motion for vacatur and disqualification has proceeded on evidence of implied bias. Justice Gunderson's February 24 "Response" changes the proceeding. The "Response" declares his *actual bias* against Combined and its lawyers. It also confirmed that

his bias has extra-judicial origins: *The Invisible Bankers*, Combined's lawyers' bar exam scores, even gossip all appear as "facts" in the Gunderson "Response." These statements and the opinions they are offered to support disqualify Justice Gunderson from participating further in this case. *Reserve Mining Co. v. Lord*, 529 F.2d 181, 186 (8th Cir. 1976). They also constitute new evidence to support Combined's motion to vacate the October 26 opinion. *See Bell v. Chandler*, 569 F.2d 556 (10th Cir. 1978) (where a judge's bias against an attorney extends to bias against the party itself, disqualification is required); *United States v. Ritter*, 540 F.2d 459, 462 (10th Cir.), *cert. denied*, 429 U.S. 951 (1976) (to like effect).

As is true of the Canon 5C(5) (c) and Canon 6C violations Neumann and Justice Gunderson committed, until the Gunderson/Neumann papers were filed last month, there was not evidence before the Court to show actual bias. Now there is. Combined deserves to be heard on these newly admitted facts.

4. Due Process of Law as Applied to Combined and Its Attorneys.

Justice Gunderson's "Response" denounces Combined as a company whose history is "dubious" and "unsavory." Gunderson "Response" at 2. He also denounces Combined's counsel in intensely personal, vindictive terms. *Id. passim.* Justice Gunderson is not a party to this proceeding, nor is Michael Wall. Nonetheless, both have been permitted by the Clerk of the Court to file papers in the proceeding, to which Combined and is counsel thus far have not been allowed to respond.[2]

Members of the Court can judge for themselves what in the Gunderson "Response" bears on the case and what

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[2] Combined attempted to lodge papers with the Clerk on March 9, before the Court's March 10 order was entered. On March 10, she told an employee of Combined's law firm she intended to throw the papers in the trash.

does not. That is no safeguard, however, against some other litigant or person in some other proceeding or place taking what Justice Gunderson says in his "Response" as Court-found fact. The Reply Combined asks permission to file will not repair the damage Justice Gunderson has done to the reputation and community standing of Combined and its lawyers. Allowing the "Response" to stand without affording the people targeted by it at least a reply violates Combined's and its lawyers' rights to substantive due process of law. *Gardiner v. A. H. Robins Co.*, 747 F.2d 1180, 1191 (8th Cir. 1984). These rights are another reason Combined asks permission to file a reply.

5. Unanimous Court.

Michael Wall's affidavit cannot be fairly accepted as part of the record unless Combined is permitted discovery into the facts that lie behind it. Mr. Wall is not a party; his affidavit was not filed by or for a party; it was not even served on Combined. What the vote was following oral argument, which is the fact his affidavit is offered to prove, is immaterial. The issue is what Justice Gunderson wrote, said, or did to influence the case before argument and thereafter, during the nearly eighteen months the case remained undecided.

Courts elsewhere have forthrightly recognized the poisonous influence one member's undisclosed bias can have on the other honest members of a multi-judge appellate court. *See Aetna Life Insurance Co. v. LaVoie*, 475 U.S. 813, 106 S.Ct. 1580, 1590-91 (1987) (Brennan, J., concurring: an "opinion has been joined by a majority" and reflects "that these judges have exchanged ideas and arguments in deciding the case." If one of the judges "has a substantial interest in the outcome" that "*necessarily* imports a bias into the deliberative process." This is likewise true if one of the judges comes to the decision-making process with the actual bias revealed in the Gunderson "Response"); (Blackmun, J., concurring: "mere par-

ticipation in the shared enterprise of appellate decision making . . . posed an unacceptable danger of subtly distorting the decision-making process"). One appellate court recently held that, where the case went to decision before the bias of one judge was disclosed, no one who sat on the original panel could or should sit on rehearing. *Johnson v. Sturdivant*, 758 S.W.2d 415, 416 (Ark. 1988). In the view of that court, participation of the biased member tainted the prior proceeding to the extent of putting before the court on rehearing "the unavoidable choice of letting a decision stand under a cloud or removing the cloud entirely." *Id.* at 416. It chose the latter.

6. Laura Fitzsimmons's Representation of Justice Gunderson.

Justice Gunderson's "Response" says Ms. Fitzsimmons represented him in a governmental not individual capacity because discovery was sought from him in *Flangas/Manoukian* of documents he held "*in custodia legis.*" Gunderson "Response" at 25. Documents from prior proceedings involving Flangas, which Combined asks permission to submit, demonstrate that this cannot be so. On the contrary, these documents and Justice Gunderson's 1987 Canon 6C disclosure statement shows he *personally* received "a legal recovery" in 1987, which he says was *not* "compensation or reimbursement for judicial or extrajudicial activities." These facts are all made relevant by the Gunderson "Response." Combined asks permission to present them in full to the Court with supporting legal authorities.

CONCLUSION

Combined presented its proposed Reply with a Motion for Leave to File Reply to the Clerk on March 9 and again on March 10. Its second submission crossed the Court's March 10 order in its delivery. Combined respectfully asks that this submission and those that have preceded it, including Combined's letter to the members of the Court on

March 10, be taken as the application for permission to respond referred to in the Court's March 10 order refusing further papers except on written application to the Chief Justice. Such permission is required if the matter is to be fully heard and fairly decided.

Respectfully submitted,

LIONEL SAWYER & COLLINS

By /s/ Steve Morris

Steve Morris
M. Kristina Pickering
1100 Valley Bank Plaza
50 West Liberty Street
Reno, Nevada 89501

GEOFFREY C. HAZARD, JR.
Yale Law School
401A Yale Station
New Haven, CT 06520

Attorneys for Respondent
Combined Insurance Company
of America

CERTIFICATE OF SERVICE

Pursuant to Rule 25(1) (d) of the Nevada Rules of Appellate Procedure, I certify that I am an employee of Lionel Sawyer & Collins and that on the date below stated I served a true copy of the Application to Chief Justice Young, or in His Absence, the Acting Chief Justice, for Permission to File a Reply to Gunderson/Neumann/Wall Filings of February 22 and 24, 1989 to the following individuals at the following addresses:

Via U.S. Mail, postage pre-paid:

Senior Justice Gunderson
Supreme Court Building
Capitol Complex
Carson City, Nevada 89710

Laura Fitzsimmons, Esq.
Lambrose, Fitzsimmons
& Perkins, Ltd.
312 West Fourth St.
Carson City, NV 89701

Peter Chase Neumann, Esq.
136 Ridge Street
P.O. Box 1170
Reno, NV 89504

Bill Bradley, Jr., Esq.
Bradley & Drendel
401 Flint Street
Reno, NV 89501

DATED this 17th day of March, 1989.

/s/ Stephanie Rose
STEPHANIE ROSE

APPENDIX C—PART 3

Jury Inst. 24

If you find that Defendant, Combined Insurance Company, breached the covenant of good faith and fair dealing in that Plaintiff, Thomas Ainsworth, suffered actual damages as a proximate result of the conduct of Defendant, Combined Insurance Company, you may then consider whether you should award additional damages against Defendant, Combined Insurance Company, for sake of example and by way of punishment. Mere breach of the covenant of good faith and fair dealing is not sufficient to justify an award of punitive damages. You must find by a preponderance of the evidence that said Defendant was guilty of oppression, fraud or malice, express or implied, in the conduct upon which you base your finding of liability.

"Malice" means a motive and willingness to vex, harass, annoy, or injure another person. Malice may be shown by direct evidence of declarations of hatred or ill-will or it may be inferred from acts and conduct, such as by showing that the Defendant's conduct was willful, intentional, or done with a conscious disregard of Plaintiff's rights.

"Oppression" means subjecting a person to cruel and unjust hardship in conscious disregard of his rights.

"Fraud" as used in this instruction means an act of trickery or deceit, intentional misrepresentation, concealment or nondisclosure committed for the purpose of causing injury or depriving a person of his property or his legal rights.

The law provides no fixed standard as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

/s/ Deborah A. Agosti
DISTRICT JUDGE

Instruction No. 24

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE
HONORABLE DEBORAH A. AGOSTI,
DISTRICT COURT JUDGE

Case No. 83-5569

Dept. No. 3

THOMAS AINSWORTH and EVELYN AINSWORTH,
Plaintiffs,

vs.

COMBINED INSURANCE COMPANY OF AMERICA, a Foreign corporation; RONALD IOVINELLI; HERMAN BACA; DOES I-V; A & B PARTNERSHIPS VI-X; XYZ CORPORATIONS XI-XV,
Defendants.

TRANSCRIPT OF PROCEEDINGS
PARTIAL TRANSCRIPT
(Closing Arguments)
March 20, 1986
Reno, Nevada

Reported by: STEPHANIE WOOD CSR #207

* * *

[34] MR. NEUMANN: You cannot get punitive damages unless a defendant has acted in a special sort of way. This is one of those kinds of cases.

Punitive means punish in Latin. That is what punitive means. And the purpose of punitive, jurors, your Honor, is not [35] to compensate Tom. There's my watch. That means I have ten minutes left, you'll be relieved to know.

Punitive damages means damages which are intended by the law to be assessed by a jury to punish a defendant who has acted in a particular kind of way, and not only to punish that defendant, but to set an example to others and an example to that defendant not to do that again, not to do this kind of conduct. Sometimes punitive damages are called exemplary damages from the term "example," because they set an example to the community.

In this case, we're asking for punitive damages, and we're asking for a large, substantial amount of punitive damages, but you'll tell us what is reasonable in that regard.

I'd just like to suggest a few examples. You know this is—This is not a case against an individual person. We're not seeking damages—We're seeking damages from a corporate defendant here. And when you measure punitive damages, the law allows you as the conscience of the community to take into account what the size of the defendant you're trying to punish is.

Now, in this case it happens to be a large defendant. You could have been called down on any kind of a case, could have been a landlord-tenant case. It could have been a criminal case. You happened to get called down by the luck of the draw I was telling you about on a case which involves a substantial insurance company, an insurance company with assets of almost [36] $1,500,000,000 in gross assets, and with a net worth as pointed out by Mr. Sims from their financial statement after taking all their liabilities, and that includes their liabilities, reserves for claims, of $428,271,000. Let's round it off to $428,000,000.

And then you heard the testimony Mr. Sims about the net income of this company. First of all, they have a gross income on a yearly basis for 1985 of seven hundred eighty-nine—almost $790,000,000 in one year and after they paid their expenses and salaries and their rent and so forth, they have $149,000,000 left over, and they pay taxes. I

notice they only paid about 50 percent taxes. They have a net income after taxes of $118,790,205. That's about $2.2 million a week after taxes.

And then we ask the accountant to put up on under both the assets, and under the income part just as an example what ten percent and one percent of these two things would be, and he did a very simple calculation, and ten percent of their 1985, which is the last available information we've on them, would be $42,000,000. One percent of their net worth is $4.2 million. Or if you want to look at the income side of it instead, ten percent of their net income after taxes would be $11,879,000, and one percent of their net income after taxes would be $1,187,000.

* * *

Let me speak to the punitive very briefly. I feel, ladies and gentlemen of the jury, that the only way you will punish this insurance company and set an example and tell this insurance company and others like it: You're not going to be able to do this kind of thing anymore, you're not going to be rejecting claims out of hand and then keep rejecting them and offer the guy 20 cents on the dollar as they did with $9,140 offer they made a year and two months afterwards. You're not going to do that later. Jurors will make it [39] expensive if you do that kind of conduct.

The way you'll tell this insurance company and other insurance companies like it that they won't get away, that you'll assess punitive damages. If you had your little boy, your little boy or my little boy, and he was throwing rocks, and you say: Billy, don't do that anymore, it's wrong. And he did it again, and you made it clear to him that that was wrong doing, he knew it was wrong doing it, as an insurance company knows it's wrong for it to do what it did here, Billy now knows it's wrong, and you don't like him to throw a rock through someone's window, and you

say: Okay, Billy. That's it. We're going to punish you. You get $10 a month for your allowance. What would be a reasonable assessment of—reasonable assessment in that case to get Billy to stop throwing rocks through the window? You won't want to take one cent out of his $10 monthly allowance. Maybe you would take a dollar or two, maybe you would take 50 cents, which would be five percent.

If you took a dollar out of his monthly $10 allotment, that would be ten percent. That would be for this insurance company $42,000,000 as to Combined's net worth, or if you thought it was more reasonable to go on the income, it would be $11,000,000, about three weeks—or four weeks of its income, about a month's worth of its income. Because it makes—excuse me—their gross income per year is $110,000,000. Ten percent of that will be $11 million. So that would be it, would be about four weeks or five weeks' worth of income.

[40] One percent of their net income after taxes for punishing them would be $1,087,000, and we put those figures on there so you'll have some idea of what we're talking about. You cannot punish an insurance company, which has assets of $1,400,000,000 by just taxing them a few thousand dollars or even a few hundred thousand dollars. They'll laugh all the way to the bank and say: Glad we got out of there, out of Reno, you know, without paying more. That's not going to deter them.

You have an opportunity in this case as the conscience of this community to set a standard and make it expensive to break that standard, and you have the opportunity that very, very few people will ever have. And ladies and gentlemen ~~of the~~ jury, I'm sorry to be talking so fast throughout this argument, but I hope that you exercise that duty with the responsibility that I know you feel in this case.

In a few minutes I'm going to sit down, and Mr. Sloane is going to tell all the reasons why he thinks I'm wrong, and I will have a chance to come back at you after lunch with more shorter argument, and the case is going to be yours. At that point, I will have and Bill Bradley and our office will have done everything we've done in this case for these very, very fine people that we have been privileged to represent. Thank you.

* * *

[73] THE COURT: Mr. Neumann, you may proceed.

MR. NEUMANN: Thank you, your Honor, Mr. Sloane, ladies and gentlemen of the jury.

This is the final part of the case before you jurors finally take over, and I wanted to say that I'm very happy that this is the final part of the case, and I appreciate the attention that you have given to all the evidence and to the arguments of counsel.

* * *

[77] All right. Thomas Ainsworth's punitive damages is the subject of yet another verdict form, and again it looks much like the others, and that's why I'm going through these, because they all look pretty much the same, and you have to go through them carefully.

It says "verdict," and it's a little longer because it says "we the jury do find in favor," I've under lined "Thomas" and it won't be on yours, "Thomas Ainsworth and against Combined on the issue of punitive damages, and assess punitive damages against Combined Insurance Company of America in the amount of" blank, and a space for the foreman of the jury to find six of the eight jurors have agreed on that verdict.

You see because this is a civil case and not a criminal case, there are some rules that change from criminal cases.

In case any of have sat on criminal cases, as you know from television or sitting in a criminal case, the prosecution must prove all the elements of the State's case beyond a reasonable doubt, and we have probably all heard that term.

In a civil case such as this one, the party that's bringing this case, in this case the Ainsworths, only have to prove the case by a preponderance. And there's an instruction that you'll have in the jury room. All that preponderance instruction means, I'd like to equate it to little boys on a [78] teeter-totter. One boy weighs 50 pounds and the other boy weighs 52 pounds. They get on the teeter-totter. When they get on there, both are equal. When we started into this case, we came out with a clean slate and we asked you jurors if you had any opinions about this case, and there was no evidence on either side of the case, and we started equally just like the teeter-totter, the one boy who weighs 52 pounds will preponderate, to outweigh the little boy who weighs 50 pounds. That's the same standard we have in a civil case. All we have to prove this case by is a preponderance, a tipping of that scale.

You'll probably have some questions. I'd like it, and you probably would if you could ask: Well, Mr. Neumann, what about this, and you didn't talk too much about this. I don't know what you're thinking. And so—And the rules don't allow you to do that, maybe we should change that, and there have been some suggestion of that, but we have to just put on the case as best we know how, and you might have some questions afterwards, and all I can say is the law doesn't require that we prove a case beyond a reasonable doubt, but only by a tipping of that scale, and I think we have done that in this case.

* * *

[80] And on the punitive damages, let's talk for another

moment again about the concept of punitive damages and the worth of this company.

When you're trying in that jury room for as long as it's going to take you to decide this case, to fill in this third verdict form on Thomas Ainsworth on the punitive damages, what this amount should be in order to accomplish the purpose that the law has charged you with, you jurors are actually almost like judges in a way, except that, you know, the system of jury trial in this country is—the wisdom of it is so apparent when you think about it.

Judge Agosti happens to be a young judge. She happens to be a very good one. There are a lot older judges than her. It's the same whether it's a young judge or older. A judge deciding a case only brings one human experience into that trial with him or her, but a jury system, which we have to present these issues to a jury, we have the wisdom and the collective knowledge and experience and life living experience of eight jurors, nine with mister alternate, and if you're, let's say, [81] average 40 years old, I'll say eight times 40 is 320 years of human experience on these issues that were presented. And that's one of the things about the jury system.

At any rate, you are charged as a jury, and part of your oath is to follow the law, and part of the law that has been given to you by the Judge is the law of punitive damages, and what it attempts to do, basically all it's attempting to do, is to defer this kind of conduct from happening in the future, and to set an example for other—for this defendant and other defendants not to engage in that kind of conduct in the future.

And that jury instruction on that duty is this one here. It's a long one, because it has a lot of law in it. But it starts out: "If you find that the Combined Insurance Company breached the covenant of good faith," and in addition, it's not just good faith. We have to prove that. They have

to prove something else. And that's what we are proving. "If you find that their conduct should serve to support an award for additional damages for the sake of example," that's why sometimes they're called exemplary damages, "and by the way of punishment," that's why we call them punitive damages, "you must find by a preponderance of the evidence," this weighing of the evidence, "that the defendant was guilty of either"—not all of these things, mind you, "either oppression, fraud or malice," and it's—there's a coma after "oppression, fraud or malice," are decided by the word "or." We don't have to prove that they were guilty of all three of these things.

[82] But if you find that they were guilty of oppression or fraud or malice and not just expressed malice, we'd never have had a case on punitive damages if there was someone that said: Boy, I knew that Thomas Ainsworth. I was out to get him. I was out to get him. That never happens. The law says we can prove punitive damages by implied malice. The facts can be used by the jury to infer conclusions or imply conclusions. And so implied is the word that the law uses.

And then it defines the three kinds, and you'll have this in the jury room, defines the three kinds of conduct that the law talks about in talking about punitive damages. "Malice means a motive and a willingness to vex, annoy, harass or injure any person."

Malice maybe shown, though, by either reckless disregard, with ill will or not acting, but it may be inferred by you, the jury, from acts and conduct such as by showing that the defendants' conduct was willful, intentional or done with a conscious disregard of the plaintiff's rights. And that is where Tom Ainsworth has proven the case in this case.

We have shown by uncontroverted evidence from Barbara Paul, and I think even without Barbara Paul from the overall facts of this case from that claims file, that

this company acted recklessly in not following the standard of claims; i.e., they didn't investigate before they filed their first denial and deny it.

But in addition, we've shown all these other things that [83] they failed to do, and all of that was reckless because they knew by doing that they were denying someone who really needed the money pretty badly, and it certainly was a conscious disregard of policy holder's rights, and that's what we have to prove in this case, and that's what we have proven, that this company disregarded Tom's rights when they denied it.

The other two definitions that might be applicable are the definition on oppression, means subjecting a person to cruel and unjust hardship in conscious disregard of his rights, and I think we have shown that by the evidence as well.

* * *

The rest of this punitive damage instruction, which is very important, and that is the law provides no fixed standard as to the amount of the punitive damages, but leaves that amount to the jury's sound discretion, exercised without passion or prejudice. And I'm not asking you to exercise passion or prejudice, and that's why I made a point to explain to you the careful process of the law. And how both sides' rights have been carefully protected in this case.

But now we're down to the part where it really counts, jurors, and that is the part where you're going to set a standard, which I think is going to be heard not only by Combined but by the entire industry, and when you discuss among yourselves what should be a fair amount of punitive damages in this case for what they have done, you can't just say: Well, it was this small claim, it was only $9600 or the $134 as to Evelyn was only a small amount. You have to compare it to something, and you have to compare the conduct and what the law is trying [85] to—is giving the punitive damage instruction to you for your job as the

conscience of this community. You have to take that in light of the one you're attempting to punish.

And when you've got a company that's making a net income after taxes of $118,000,000 a year, I feel that a—a reasonable verdict for the punitive damages is somewhere between one and ten percent of that, and I think it should be closer to ten percent. Maybe the seven percent that Dr. Goldfinger, his $28,000 a year from the insurance company represents of his total income, that's a standard. I don't know.

There's no fixed standard for this, but I would remind you of my analogy this morning that if you're trying to punish someone, and the only way you can punish them is by a monetary amount. We're not asking somebody to go to jail in this case. They can do anything they want, as far as bad faith. Nobody goes to jail. Nobody is asked to pay any personal fines in this company. But we're asking the company itself to pay a fine, and we think that the jury should make that fine reasonable in light of the overall power and monetary wealth of this defendant.

We're not dealing with some small merchant on the street corner. We're dealing with one of the biggest corporations in America. And the only way this corporation is going to be deferred from this kind of conduct in the future is if your verdict for punitive damages that the boardroom in that company are going to say: We're going to change the way we do business. Maybe we'll get people in the claims department to ask questions [86] before they deny. And when they get evidence that a claim should be paid, they will treat their insured policy holders fairly.

And I think it would be good for the company itself, because if word gets out this is the way they treat their policy holders, and they go on with business this way, I don't think they'll have $1,400,000,000 in gross assets ten years from now, because people will stop buying this insurance.

So think your damage award for punitive damages will have the salutary affect not only on people like Tom Ainsworth, but I think it will help the insurance industry as a whole, and root out this conduct. There's no other way to do it. There's no other mechanism that the law allows other than what you're going to be doing on this jury. There is no Attorney General, there's no President of the United States; Congress won't do it either. You do it or nobody does it.

* * *

NEVADA REVISED STATUTE 42.010 (1988)

In an action for the breach of an obligation not arising from contract, where the defendant:

1. Has been guilty of oppression, fraud or malice, express or implied; or
2. Caused an injury by the operation of a motor vehicle in violation of NRS 484.379 or 484.3795 after willfully consuming or using alcohol or another substance, knowing that he would thereafter operate the motor vehicle,

the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

NEVADA ASSEMBLY BILL 307
(Effective May 30, 1989)

* * *

Sec. 2. Chapter 42 of NRS is hereby amended by adding thereto a new section to read as follows:

1. In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant. Except as otherwise provided in this section or by specific statute, an award of exemplary or punitive damages made pursuant to this section may not exceed:

(a) Three times the amount of compensatory damages awarded to the plaintiff if the amount of compensatory damages is $100,000 or more; or

(b) Three hundred thousand dollars if the amount of compensatory damages awarded to the plaintiff is less than $100,000.

2. The limitations on the amount of an award of exemplary or punitive damages prescribed in subsection 1 do not apply to an action brought against:

(a) A manufacturer, distributor or seller of a defective product;

(b) An insurer who acts in bad faith regarding its obligations to provide insurance coverage;

(c) A person for violating a state or federal law prohibiting discriminatory housing practices, if the law provides for a remedy of exemplary or punitive damages in excess of the limitations prescribed in subsection 1;

(d) A person for damages or an injury caused by the emission, disposal or spilling of a toxic, radioactive or hazardous material or waste; or

(e) A person for defamation.

3. If punitive damages are claimed pursuant to this section, the trier of fact shall make a finding of whether such damages will be assessed. If such damages are to be assessed, a subsequent proceeding must be conducted before the same trier of fact to determine the amount of such damages to be assessed. The trier of fact shall make a finding of the amount to be assessed according to the provisions of this section. The findings required by this section, if made by a jury, must be made by special verdict along with any other required findings. The jury must not be instructed, or otherwise advised, of the limitations on the amount of an award of punitive damages prescribed in subsection 1.

4. Evidence of the financial condition of the defendant is not admissible for the purpose of determining the amount of punitive damages to be assessed until the commencement of the subsequent proceeding to determine the amount of exemplary or punitive damages to be assessed.

Sec. 3. NRS 42.010 is hereby amended to read as follows:

42.010 *1.* In an action for the breach of an obligation, [not arising from contract,] where the defendant [:

1. Has been guilty of oppression, fraud or malice, express or implied; or

2. Caused] *caused* an injury by the operation of a motor vehicle in violation of NRS 484.379 or 484.3795 after willfully consuming or using alcohol or another substance, known that he would thereafter operate a motor vehicle, the plaintiff, in addition to the [actual] *compensatory* damages, may recover damages for the sake of example and by way of punishing the defendant.

2. The provisions of section 2 of this act do not apply to any cause of action brought pursuant to this section.

Sec. 4. The amendatory provisions of this act do not apply to any cause of action where the trier of fact has made a decision to award exemplary or punitive damages before the effective date of this act.

Sec. 5. This act becomes effective upon passage and approval.

Limitations on Awards of Punitive Damages in certain action: Hearings Before Joint Nevada Senate and Assembly Committee on Judiciary on AB 307 and 436, Nevada Legislature (1989) (excerpts of testimony) (prepared by Nevada Legislative Counsel Bureau)

Testimony of Margo Piscevich, Attorney

The third proponent to speak on A.B. 307 was Margo Piscevich. Ms. Piscevich described her background and qualifications as defense attorney typically representing the insureds, *e.g.*, the hospitals, the person driving the car, the homeowner owning the dog, etc. For this reason, Ms. Piscevich said her perspective on the subject of punitive damages was neither plaintiff or victim oriented. She continued saying, "Approximately a month ago the American Bar Association's magazine talked about the ten largest awards in the United States in one year. One of those awards was entered in the state of Nevada for $22 million. Those ten awards, including the punitive damages, totalled approximately $195 million. I personally find that a little bit mind-boggling. . . . And what basically happens to that money, it primarily goes to plaintiffs, to victims and their counsel. Cases involving punitive damages are seldom tried on the merits of the claim. For example, the focus by the plaintiffs in an insurance 'bad faith' case is an inartfully worded memorandum or correspondence, or claimed insensitivity for inappropriate behavior by a claims manager, or claims personnel. This is only to engage the outrage, passion and prejudice against the 'deep pocket' of such insurance companies. . . . Most of us are employees, not employers, so when you try a wrongful termination case you also see the outrage of the jury in the same way. You see it against a manufacturer of a car, the manufacturer of a product, as we are all consumers and not the actual designer. In hindsight, you could always have done something better.

" . . . What happens in punitive damages cases is there is no meaningful guidance. That is the big key. Punitive damages are awarded as a matter of the moral discretion of each individual juror. They can overwhelmingly be a propensity in these settings for arbitrary, capricious and wholly unpredictable enforcement of punitive damages. Historically, punitive damages were very seldom used, and it was a very rare and remote remedy. . . . Punitive damages were reserved for the actual outrageous, extreme behavior in very rare cases. Punitive damages were awarded not only to punish but to deter and to make sure that this conduct never happened again. What's happened is that now punitive damages are actually a commonplace part of the prayers in almost every tort action filed. . . . Punitive damages are a reality—a windfall for the plaintiff and to their attorneys. What we need to do is examine the policy under which punitive damages are imposed. Jurors decide what is appropriate punishment for a civil defendant. We need a statute which will establish a general range in which juries can exercise this discretion. Under the present system there is no way for a corporation or a business or an individual to ascertain how much punishment might be imposed for conduct that at some later day can be viewed as wrongful. Keep in mind lawsuits are always filed after the conduct happens and when you're doing it you don't really know that it's going to be determinative in the manner in which it is later on.

"Punitive damages serve no compensatory purpose . . . and the plaintiff has no vested right to punitive damages. Punitive damages serve what is traditionally known as criminal purposes, but there are no standards for the maximum amount of punishment. Basically, what we're talking about is the imposition of large public fines in order to prohibit and deter what is otherwise analogous to criminal punishment to which the 8th Amendment of the United States Constitution can apply. . . . One of the problems with punitive damages is that the amounts bear no rela-

tionship to the actual harm caused. I anticipate that you will hear lots of testimony about the Ainsworth case [*Ainsworth v Combined Ins. Co.*, 104 Nev. Adv. Op. 92 (October 26, 1988)]. This is a case in which the victims bought an insurance policy for medical payments and the insurance company refused to pay $9,600 in insurance benefits. According to the opinion as printed by the Nevada Supreme Court, it sounds like there were some very grievous things that the insurance company did and I'm sure that Mr. Neumann and Mr. Bradley will bring you up to date on all of that.

"The court awarded $200,000 in compensatory damages to Mr. and Mrs. Ainsworth. . . . The jury then awarded $5.9 million in punitive damages, and what I'm saying is that the punitive damage award bears no relationship to the harm caused to these people. What the courts did, and especially in the Ainsworth decision said, 'Well the Supreme Court is going to look and determine what's a fair award for punitive damages. . .' "

Ms. Piscevich reiterated the proclivity of court and juries to look at the financial condition of a defendant for a standard in awarding punitive damages. This was often done without taking into account the culpability of the defendant, the vulnerability of and injuries suffered by the plaintiff, the offensiveness of the punished conduct, and whether the punishment levied would deter future conduct. The answer, Ms. Piscevich opined, would be to have legislation and public policy which would ensure that punitive damages bore some relationship to compensatory damages. And, she said, indeed the Supreme Court was now studying what was "too much punishment" for a defendant.

One recommendation Ms. Piscevich made was to change the term "actual" damages to "compensatory" damages, as the terms appeared in A.B. 307 on page 1, line 26 and again on page 2, line 3. She agreed with Mr. DeLanoy the process of bifurcation had merit which might well be writ-

ten into the bill; and that language should be devised which would require a higher burden of proof for the plaintiff.

Testimony of Andrew Brignone, law offices of Lionel, Sawyer and Collins

Following Ms. Piscevich's testimony, Mr. Brignone added testimony supporting A.B. 307. He described his background, qualifications and present capacity advising and representing Nevada companies and employers on employment, employment law, and wrongful discharge suits.

Mr. Brignone said, "Something that has been mentioned, but bears repeating, is that punitive damages have nothing to do with compensating a plaintiff. Punitive damages are designed to *punish wrongdoing.* They are designed to punish a wrongdoer for outrageous and egregious behavior. They are fines, they are, in effect, quasi-criminal penalties. Those who defened the present system of punitive damages most often do so by pointing to a few isolated cases presented for their maximum emotional impact and lurid detail. They focus on the ends as a justification for the means. I think, in dealing with a subject this important, the proper focus is on the means, or the process, by which punitive damages are adjudicated. It is the system that A.B. 307 substantially addresses.

* * *

"The private citizens under the present system of punitive damages have no objective standards to guide their judgment. The only words they have to use are words like malice, oppression, and fraud. Words that are inherently undefinable. Words that are inherently subjective. Words that are highly emotional and appeal to the emotions. In criminal cases, the standards for finding wrongdoing are very specific, very well defined, and very well understood. And, in fact, in criminal cases, it is required that the indictments or the criminal complaints be very specific in that respect. The private citizens under the present system

of imposing these quasi-criminal penalties have virtually no limits on the amount of penalties that can be imposed. Now sure, there's a standard that says you can't impose punitive damages if to do so would financially destroy a company, but with a threshold that high, a considerable amount of damage can be done without reaching it.

"In the criminal area, the fines, the penalties are specified by statute, or in detailed sentencing guidelines that are uniformly applied by judges, and there's probably no other system of punishment except the punitive damage system, in which the prosecutor or the plaintiff's attorney has a substantial personal financial interest in the outcome of that case, and if that occurred in the criminal area, any conviction and sentence would be automatically voided as unconstitutional.

* * *

Testimony of Lawrence Semenza, representing the Nevada Trial Lawyers' Association

Opening testimony in opposition was Lawrence Semenza. Mr. Semenza described his background and qualifications which illustrated in-depth and broad knowledge and experience in the field of punitive damages on both the state and federal level. After opening remarks, Mr. Semenza said, " . . . those parts that I wish to speak against today is the limitation, the two times the amount of compensatory or damages that are awarded as a result of the negligence or wrongful acts of a particular individual. First of all, I want you all to understand that punitive damages, as have been alluded to by the other speakers, do not arise from a situation where someone makes an error, someone who utilizes bad judgment, or someone who is negligent in their acts. Where punitive damages arise is in those areas where, as the statute sets forth, there's fraud, oppression—Basically, as Justice Springer has set forth, that a jury, not unlike a committee, not unlike these

committees, have the opportunity to listen to the evidence, to the testimony, to view the exhibits and come to a conclusion whether or not first of all, there has been liability established for negligence. Whether or not those negligent acts arise to the conduct of intentional, oppressive, fraudulent or malicious is the next decision that that jury has to make. And the jury system, as you all know and are very familiar by now, is the ability of the community through a jury, or for a judge, to issue an edict, a mandate, that they will not tolerate this type of malicious, fraudulent or oppressive conduct in the future, and to set, as an example, a fine or a penalty against that particular wrongdoer.

* * *

"The next line of cases are those insurance 'bad faith' cases—that's the *Ainsworth v Combined Insurance Co. of America*, 104 Nev. Adv. Op. 92, and the *Hires v Republic Insurance Co.*, and at first blush the $6 million or $5.9 million in the *Ainsworth, supra*, and the $22 million in the *Hires, supra*, immediately jump out and say, my God, that's a lot of money to award, but in each of those cases you had to look at the deterrent effect. If I recall correctly, in one case it was 5 percent of the net income for a particular year and in another case it was approximately 5 percent of the net worth of that company. The question then becomes whether or not you are going to impose limitations upon a jury. Is that too much as an award for punitive damages? The question then comes, is what type of deterrent effect do you want. Is it going to be like a mosquito on the back of an elephant? The elephant doesn't even feel the mosquito bite. Or, are you going to have to hit somebody hard enough alongside the head . . . to get their attention? To get them back to reality. To know what's wrong. To make those corrections.

* * *

"There is no real trend, one might say, that punitive damages are increasing or that there is such a stampede to impose punitive damages.

* * *

"The next question then comes down to is whether or not there is any guidance or any safeguards that are provided to the individual who has been sued for punitive damages. The greatest safeguard are the advocates who appear on behalf of the litigants. Those are the lawyers. In addition to those lawyers who are appearing on behalf of their respective clients, there is the court itself who, if the court believes that the plaintiff has not made out a prima facie case at the close of the plaintiff's case, the case is dismissed. It never gets to the stage that the jury has to consider whether or not damages should be awarded, let alone punitive damages. In addition to that there are instructions which the court gives at the conclusion of the case that sets forth the guidelines and the standards. Again, this is an adversarial proceeding. Each side has to request the instructions that they believe set forth the law. And . . . there are certain standards that have been set forth and are utilized in cases pertaining to punitive damages. They define malice. They define fraud. And then they tell the jury . . . you're to consider the following: The reprehensibility of the conduct of the defendant; the amount of punitive damages which will have a deterrent effect on the defendant in light of the defendant's financial condition. That doesn't mean to annihilate the defendant—and I do not believe that there have been any businesses in the state of Nevada that have been annihilated as a result of an award, or an assessment of punitive damages.

* * *

Testimony of Allan Earl, Attorney

Following Mr. Semenza, Allan Earl added opposing testimony. He voiced his hope that the day would come when the rights of the citizens of the state of Nevada were no longer being challenged as they were now by statutes such as A.B. 307. After perusing the various publications sub-

mitted by proponents of A.B. 307 and listening to their submissions Mr. Earl said, "I am struck by various phrases. 'Our system has gone haywire,' 'There are no guidelines,' 'Companies can now face serious financial ruin or even bankruptcy,' 'We're making windfall millionaires out of plaintiffs and their attorneys,' 'Isn't compensation enough?' 'Other states have seen the light and they are jumping on the judicial bandwagon,' I've ever heard Mr. Sloan who I admire and respect tell you that his statute is wrapped in the constitution, and I have heard trumpeted that this legislature must now rise up and protect the rights of business. I have heard that we have to get up to date with the rest of the country. I have heard that the tort reform wave has passed Nevada, and my comment is, 'Thank God it has.'

* * *

"So let's take a look at that. This case has been mentioned before by other speakers, and I'm somewhat tempted to read law to you, but since they did, let me tell you, the biggest thing they have going for them, as far as I'm concerned, is the assertion there are no guidelines. Now if you write anything down from what I say, and if over the years you have gained any kind of confidence in my credibility, then would you please write down this. There are guidelines in Nevada—and I want to read them to you. First of all, before I do, I want you to become intimately familiar with the beautiful words of one of the judges on our Supreme Court. They could be the best words that he ever wrote. 'Punitive damages provide a means by which the community, usually through a jury, can express community outrage or distaste for the conduct of an oppressive, fraudulent or malicious defendant, and by which others may be deterred and warned that such conduct will not be tolerated.' Now if that, in and of itself, was all that opinion said, they would be right, but it is not, for the following language appears. A discussion of

punitive damages, and then this language. Now this case was decided 16 months ago. It is the law in Nevada. With this in mind it would appear timely for this court, our Supreme Court, to elaborate a rule or standard based upon this process of judgment, the evaluation of excessiveness on the basis of the award's reasonable and proportional relationship to the guilt and culpability of the tortfeasor. And then it goes on to say, 'We declare the following standard for evaluating excessiveness of punitive damages. Punitive damages are legally excessive when the amount of damages awarded is clearly disproportionate to the degree of blameworthiness and harmfulness inherent in the conduct.' And then they go on to outline what every single judge in Nevada has to do in evaluating a claim that the other lawyers bring that says, 'This award is excessive.' In those tiny amount of cases where punitive damages have been awarded, where a judge has allowed a jury instruction to go forward to the jury that says, 'You may consider this,' and that's not an easy instruction to get, and an award has been granted, then every trial judge in Nevada and the five judges on our State Supreme Court, have to look at the following questions to determine if it is excessive: Financial position of the defendant; culpability and blameworthiness of the tortfeasor; vulnerability and injury suffered by the offended party; the extent to which the punished conduct offends the public's sense of justice and propriety; and the means that are judged necessary to deter future conduct of this kind--a five-step approach.

"Now in this case I'm reading to you from, they decided the awards were excessive and they reduced them. In the *Ainsworth, supra*, case, and I think you should know Mr. and Mrs. Ainsworth are sitting here in the audience—you want to find out how the insurance company treats people? ask them. The court went through an analysis of every one of those factors. Now, the insurance attorneys didn't like their result, but are they the ones that are going to decide what's good and bad for Nevada? What I am trying

to tell you is this. We have a standard in Nevada. We have a standard that says, 'Only certain kinds of conduct will be punished and if those awards are granted, we have now a procedure for the last 16 months published standards by which every trial judge and our Supreme Court evaluates any case that is appealed. Now that's a system, I tell you works very well. And why would we want to change it? I don't think we should.

* * *

If you pass the bill presented by the gaming industry and supported by CAALI [Coalition for Affordable Liability Insurance] then I'm telling you what you have done is taken away the language given by one of our Supreme Court judges and what you're going to do is mute the outrage of the community and you are going to muffle their indignation. And, we have a system of standards and guidelines now in effect that applies to every case and every judge that can right any wrong that a jury might do because they get carried away with prejudice or passion. Ladies and gentlemen, please understand this is the very thinnest slice of cases we're dealing with and if you use the safeguards we have now and if you feel constrained to pass the ones that we have suggested, you have protected the citizens of this state and you have granted industry and business some of the things that they need."

* * *

Testimony of Peter Neumann representing the Nevada Trial Lawyers' Association

Mr. Neumann remarked on his background and opined that corporations, by their very nature, were an "endless circle of irresponsibility," and a means by which a group of individuals could come together in an atmosphere free of worry about personal liability. He continued, saying, "A corporation can kill, maim, fraud, defraud, or otherwise

injure someone and . . . you cannot put a corporation in jail." The only weapon society had to deal with corporate misconduct, Mr. Neumann asserted, was to seek court relief by means of punitive damages. Nor were punitive damages "out of control," as had been stated by proponents of A.B. 307, Mr. Neumann said. There were very few cases of punitive damages which had ever been paid in the United States, as they were subjected to the most intense review by first, the trial judge after the trial, and second, the appellate court system. Safeguards provided in court review and opinions which could rule a claim "excessive" obviated the indiscriminate and frequent award of punitive damages. Additionally, Mr. Neumann said, " . . . If these giant corporations can do away with punitive damages, even though they are a very small area of the law, they'll know they can get away with it everywhere else. And so I ask you, please, don't limit punitive damages to two times, or anything else. Let the jury system do its work. Let the appellate system do its work.

* * *

Limitations on Award of Punitive Damages in Certain Actions: Hearings Before Nevada Senate Committee on Judiciary on AB 307, Nevada Legislature (1989) (Excerpts of Testimony) (Prepared by Nevada Legislative Counsel Bureau)

Mr. Bradley introduced Mr. Neumann to speak on the insurance exceptions. Mr. Neumann advised he also was with the Nevada Trial Lawyers Association. He agreed with Mr. Earl that there should be no limitation on punitive damages in any case. Mr. Neumann suggested it is the opinion of some that it is somehow good to limit the jury in assessing liability in punitive damages cases. He stated: "Where I come from, you are going to take some peoples rights away under whatever bill you passed, and the less number of classes of people that you take those rights away from, the better." One class affected by this will be those who have been victimized by large insurance companies in bad-faith cases. He cited an example:

> Allstate vs. Hawkins, an Arizona Supreme Court case, . . . in which Mr. Hawkins was an insured policy holder of Allstate Insurance Company. His car . . . was wiped out in an accident. He put in a claim for property damage on his car—which was totaled out in the accident—and everybody agreed, he and the insurance company, that his car was a total loss. The car was worth $7,000. He settled the case, after a long hassle with Allstate, for $7,000. When he got his check from Allstate, there was less than $7,000 on the check, by $100 less. When he called the agent for an explanation, the agent said well part of that you had a deductible of $50 . . . , and the other $35 was for a cleaning deposit. Now Mr. Hawkins, quite understandably asked, why would there be a cleaning deposit when my car has been [totaled], . . . and the agent said we do that with everybody, we just do that. Mr. Hawkins was dissatisfied with that and sued Allstate. The Ar-

> izona jury decided, after hearing from a former Allstate adjustor who was no longer with the company, that well, we do that with every claim for property damage because, as one of our bosses told us, if we have a million claims a year and a $35 deposit, that's $35 million a year extra for Allstate. The jury didn't like that. On that . . . $35 claim, they awarded Mr. Hawkins $3.5 million to punish Allstate and give them a signal not to do that any more. . . . So there is the $35 claim, that had this statute been in effect that you are proposing, Mr. Hawkins could have only gotten about $200 or so. And that would not have taught Allstate a lesson to do that. That case was appealed to the Arizona Supreme Court; the Arizona Supreme Court affirmed the decision; they filed a . . . petition with the United States Supreme Court which was denied. (Editing added.)

Mr. Neumann cited another case from the Mississippi Supreme Court.

> In this case Mr. Crenshaw was insured for a health, life and accident policy with Bankers Life [Insurance Company]. [Mr. Crenshaw] dropped an anvil on his foot at home; had a fairly serious result [because] he had diabetes and developed a blood clot. . . . He had to have his foot amputated. He put in a claim for his policy coverage and it was about a $20,000 claim. Bankers Life refused to pay him saying this is not an accident, which is what we insure, you had a disease—diabetes—and the fact that you dropped an anvil on your foot is only incidental. Your foot was lost because of your diabetes, not because you dropped the anvil. The jury in Mississippi disagreed with that and awarded Mr. Crenshaw $20,000 on his claim and, to show Bankers Life

> a lesson not to do this to other people again, also awarded him $1.6 million in punitive damages. That went up to the United States Supreme Court which . . . did hear the case and affirmed the decision. In that case Mr. Crenshaw's total claim would have been $60,000 under a three times compensatory damages ratio. I don't think $60,000 would have taught Bankers Life the lesson that was taught to it by that Mississippi jury, by that Mississippi Supreme Court, and ultimately by the United States Supreme Court. (Editing added.)

Mr. Neumann told the committee it is very good that this bill does not wipe out the rights of people victimized by large insurance companies. He remarked it must be kept in mind, that insurance companies tend to be very, very large financial institutions. He cited Aetna Casualty has assets of about $50 billion. Mr. Neumann stated, with the kind of money that one company like that has, means they can afford to fight their policy holders, and that for a jury, in court, to punish a company like that must involve substantial damages. He reinterated, "You can't take a $50 billion company and teach it a lesson with a $200,000 verdict." He stated, in insurance claims like this, generally the compensatory damages are quite small.

Senator Neal questioned if this legislation is to maintain in the law the ability to collect from those who can pay the larger awards. Mr. Neumann replied the law now states, with certain built in limitations such as a district court, and then an appellate court, to limit or reduce the award after a jury has assessed it; the purpose of punitive damages is to punish. Therefore, he pointed out the amount of punitive damages has never had any kind of relationship to compensatory damages.

Senator Neal inquired about the Browning-Ferris Industries (BFI) case heard in April by the Supreme Court

in which they will render a decision in June. He suggested that particular case has everything there in terms of punitive damage—the classic example of the little guy versus the big guy. Senator Neal queried: "Why is there a rush to do this. Are we not going to be, say in 2 more years from now, because of the ruling in that particular case which will be coming down, that we might have to reconsider all of this all over again?"

Mr. Neumann replied he has followed that case very closely. He commented his knowledge is acquired from what he reads in the newspapers, but the press information seems to indicate that the Supreme Court is not going to hold punitive damages unconstitutional.

Mr. Bradley interjected there seems to be an inclination from the Supreme Court, in earlier cases, some desire to have a reasonable relationship between compensatory damages and punitive damages. Mr. Bradley added:

> However, in the BFI case, the same justices that earlier have indicated a willingness to consider that position, were probably the strongest advocates for the little guy in that argument in front of the United States (U.S.) Supreme Court. So everybody is . . . in a very unsure position right now, because in one case they indicate they might be willing to do something, yet when given the opportunity on one issue of punitive damages, that was the 8th Amendment—excessive fines clause in the BFI case—we saw [a] completely different sort of comments come from the justices.

Mr. Neumann commented:

> That case was basically a state anti-trust case, where one business man, who owned a refuse collection company, sued another one. And the reason for the punitive damages awarded by the

> jury was the evidence that came out during that trial . . . where it turned out that the large company just decided to put the small company out of business by predatory pricing and other antitrust violations. . . . There was actually evidence in the case that the president of the large company was quoted as saying 'we are going to squash this guy like a bug,' and he did, he put him out of business. So the jury came back with a verdict in that case with about $6 million in punitive damages and the compensatory damages were only about $50,000 . . . as the small company had not been in business long enough to establish that they had very significant damages. . . . I agree . . . that that case might very well have a bearing on what all the states do on legislation.

Mr. Bradley next introduced Mr. Galane to speak on the defamation aspect of this bill. Mr. Galane began:

> I am here . . . to address the justification served by not limiting the award for punitive damages expressly exempted by subsection 2 (e), in those cases where a person seeks recovery for defamation. In addition, . . . I think I can shed light upon the matter raised by Senator Neal regarding the impact, if any, of the pending case before the U.S. Supreme Court. A defamer may entertain the most malicious thoughts and intentions while defaming a person, yet that person could have devoted a lifetime to build up an exemplary reputation in the community so that there is only a remote possibility that the victim would suffer any observable injury to his or her reputation. Unless the victim of a defamation enjoys an exemption from a specific ratio or cap, it would mean that a defamer would gain immunity no matter how venomous or malicious his or her tact

simply because of the excellent reputation of the defamed. It would mean that the defamer, motivated by actual malice, becomes the beneficiary of the very unassailable reputation that the victim has built up, and so escapes punishment. It would require that punitive damages be determined in inverse ratio to the reputation of the victim of the defamation. Therefore, defamation is in a class by itself. In short, the person most entitled to go to court and seek to set an example that would serve as a deterrent against future malicious defamation, that is the person who has devoted his or her lifetime to the construction of the unassailable reputation, and therefore, one who would not suffer observable injury would have the least incentive, thereby leaving the defamer, who was motivated by the most malicious motives and thinking, free in the future to repeat the defamation. An individual who has devoted a lifetime to public service, for example, at great financial sacrifice, perhaps for the sole reason that he or she wished to enjoy the admiration and respect of the members of his or her community, can wake up one day and find that in 3 minutes of a television broadcast, in the rare . . . situation that it is motivated by malice, has his or her reputation attacked and may not be able to demonstrate to a court observable injury because of that unassailable reputation, yet that is the victim who has the greatest incentive to go to court and seek a significant award of punitive damages in order to achieve deterrents against repetition of that sort of malicious defamation by the particular defamer involved in the case and others similarly situated.

In addition, the law has very built-in protections for defendants in defamation cases that will re-

main intact even if the exemption of subsection (2) (e) from a cap or a ratio is adopted by the Nevada legislature. The Ninth Circuit Court of Appeals held, as far back as 1974, . . . that, in order that punitive damages not threaten first amendment free press rights, the only way it could be constitutional is if the courts that try these cases require a reasonable relationship between punitive damages and compensatory damages. There is a case that arose out of a suit brought by a Nevada citizen, entitled Robert Mayhew vs. Hughes Tool Company. Now the significance of the reasonable relationship rule is that judges and juries can weigh the actual harm against the punitive damages that they apply reason, and take into account other factors having a bearing on the matter, such as the financial resources of the defendant, as well as such matters as potential harm inherent in the publication at issue, but which actually, due to fortuitous circumstances or luck such as an unusually unassailable reputation, no actual harm is inflicted. And under reasonable relationship, a judge and a jury can weigh the degree of malice—how deep rooted is the ill-will that motivated the particular defamation; how strong was the purpose or intent to injure the reputation of the victim; to what degree did the defamer have in his or her mind as to serious doubt as to the truth of what was published; did the defamer actually know that what was published was false—these are degrees of . . . reprehensibility. . . .

In addition, the state of Nevada has a special statute protecting the media. Nevada Revised Statute (NRS) 41.337 does provide that punitive damages may be awarded against a radio station, television station or newspaper. But it imposes

> a special condition that it be a defamation in which the plaintiff can prove that the 'defendant published or broadcast the statement with actual malice' and in NRS 41.332, actual malice was defined as 'that state of mind arising from hatred or ill-will toward the plaintiff.' Now it is extraordinarily rare that any journalist would publish a defamatory matter motivated by hatred or ill-will. Therefore, the Nevada Legislature has already built into the laws of our state extraordinary protection for the media before you could even cross the threshold in a media defamation case of submitting the question of punitive damages to a jury.

Mr. Galane responded to Senator Neal's earlier question regarding the pending U.S. Supreme Court case.

> I candidly do not think that that case will have any impact upon the work that the Nevada Legislature is doing with regard to this proposed legislation for these reasons. The case presents a very limited issue. The issue is as follows: Whether a ratio of an excess of 100 to 1, in what they called an economic tort case, and tort is merely a fancy lawyer's word for wrong, unfair competition in which there was predatory price cutting violative of the common law of the state of Vermont. Whether such a ratio . . . in that limited context, an economic wrong, violated the Eighth Amendment to the U.S. Constitution or some other provision of the U.S. Constitution. Now a number of results can flow when we get the ruling and we will have it by July, when the term ends. And no one can predict what the outcome will be. Sometimes the justice who feels the most strongly in favor of a particular position will project the image of a devil's advocate and ask questions that are just the opposite. Then

you will open, as it happened in this instance, the Wall Street Journal the next morning and the impression is conveyed that the court will not do anything about punitive damages. It may turn out to be just the opposite. . . . These are the results that can flow out of that case. They can say one, the Federal Constitution has nothing whatsoever to do with punitive damages and the entire matter is a state matter under the control of state legislators and state courts. Or they can say secondly that in that limited context, an economic wrong with a ratio in excess of 100 to 1, we find . . . a Federal Constitutional provision has been violated and therefore there must be a need for the courts below to exercise more vigorous restraint in weighing what is the allowable ratio. But such a result would not take away from state legislators the prerogative for adopting, for their particular state, what they deem to be appropriate public policy regarding a ratio, cap or any exemptions thereto. And still a third result of the case could be . . . that, because the case came up through the federal court system, . . . even though it is what they call a diversity case, . . . federal judges should exercise a greater degree of supervisory power and they should decide, without federal constitutional restraint, that in their judgment there should be more vigorous review within the federal judicial system of these punitive damage awards, and therefore, that particular ratio in that case was somewhat too high—they could send it back for a degree of curtailment. All of those results would in no way justify a state judiciary or state legislature ignoring the question. Therefore, the work of this legislature will not be in vain in the light of the outcome of that case. I must state this catagorically, there

> is nothing before the United States Supreme Court in that case to declare punitive damages unconstitutional.
>
> The reason I came forth this morning is to explain to you why there is a sound public reason to exempt defamation from any ratio or cap in the manner in which is has been proposed in subsection 2 (e). I might add one passing thought. I keep using the phrase, justification or sound reason or legitimate reason—I think the appropriate phrase is one that was used in the courts, and this was in the Ninth Circuit Court of Appeals . . . 'We find the state's interest in deterring malicious defamation for the purpose of protecting privacy and reputation, even when public figures are involved, is compelling.' This is a case that arose out of the problem of a Nevada citizen . . . ; it was litigated in the California Federal Court . . . and that statement was made in the context of the allowance of punitive damages.

Senator Neal asked, "Are we not inviting an equal protection problem?" Mr. Galane responded this problem will exist whether invited or not. He insisted any time the legislature sets up classifications there will be questions raised as to the rationale of such classifications. Mr. Galane added:

> Now some classifications are inherently suspect. Therefore, the U.S. Supreme Court has expressly lowered the threshold required to show a rationality to be blunt and explicit; a classification based on race, religion—would be inherently suspect. If someone passed a law and put in it a classification that said individuals with blue eyes are not eligible for a license, but individuals with brown eyes are eligible for a license—that is in-

> herently suspect. Now, in this instance, you probably are not dealing with inherently suspect classifications, so the courts will defer to the judgment of the legislature in considering the rationality of the classification. . . . There is not only rationale to justify that particular exemption but indeed 'compelling' reason, and I have used the language of the Ninth Circuit Court of Appeals.

Mr. Neumann contended the legislature must do what it has to do without addressing the outcome of the U.S. Supreme Court case. Mr. Galane added other states are addressing these same problems and concerns. Mr. Galane stated:

> There was the U.S. Supreme Court decision, a year ago, called Crenshaw, that was mentioned by Mr. Neumann as an insurance bad-faith case that emanated from the state of Mississippi. [The case of] Crenshaw vs. Bankers Life, in which Justice Marshall, in authoring the majority opinion, said that because the issue had not been properly raised in the Mississippi state courts, he was not going to address the constitutionality of punitive damages. But in the body of the opinion, he explicitly invited the state legislators to address it. He said one of the reasons there may be no need for the U.S. Supreme Court to get into it is because it may be addressed by state legislators [and] state courts, and out of the experimentation that has historically been carried out by state legislators and state courts, we can end up, some day, with what will appear to be a comparatively uniform nationwide policy. (Editing added.)

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